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Great Britain, Court of King's bench
R E P O R T S *

OF

C A S E S

ARGUED AND DETERMINED

In the Court of King's Bench,

IN THE

Nineteenth, Twentieth, and Twenty-first Years
of the Reign of GEORGE III.

By SYLVESTER DOUGLAS, Esq.
OF LINCOLN'S INN.

THE THIRD EDITION, WITH ADDITIONS.

P A R T I.

*Equidem cum colligo argumenta causarum non tam ea numerare soleo
quam expendere.* CICERO.

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P R E F A C E.

TH E R E is no species of publication which demands a more scrupulous accuracy than those histories of judicial proceedings and decisions to which the name of *Reports* has been long appropriated.

The immediate province of the courts of justice is to administer the law in particular cases. But it is equally a branch of their duty, and one of still greater importance to the community, to expound the law they administer upon such principles of argument and construction as may furnish rules which shall govern in all similar or analogous cases.

Such are the various modifications of which property is susceptible, so boundless the diversity of relations which may arise in civil life, so infinite the possible combination of events and circumstances, that they elude the power of enumeration, and are beyond the reach of human foresight. A moment's reflection, therefore, serves to evince, that it would be impossible, by positive and direct legislative authority, specially to provide for every particular case which may happen.

Hence it has been found expedient to entrust to the wisdom and experience of judges, the power of deducing, from the more general propositions of the law, such necessary corollaries, as shall appear, though not expressed in words, to be within their intent and meaning.

Deductions

Deductions thus formed, and established in the adjudication of particular causes, become, in a manner, part of the text of the law. Succeeding judges receive them as such, and, in general, consider themselves as bound to adhere to them no less strictly than to the express dictates of the legislature.

But whether a certain decision was ever pronounced, and, if it was, what were the reasons and principles upon which it was founded, are matters of fact, to be ascertained and authenticated, as all other facts are, by evidence.

The law of this country has been peculiarly watchful to prevent the approaches of falsehood, in the investigation and proof of the particular facts litigated between contending parties. For this purpose many rules have been established relative to the competency or admissibility of evidence, of all which the ultimate object is, to guard the avenues of belief, and to secure the minds of those who are to determine, from imposition and mistake.

It would be natural to expect a caution still more rigid with regard to the evidence of judicial proceedings and decisions. Whether a particular act was done, or contract entered into, by a party to a cause, or not, can only affect him and his opponent, or, at most, those who become their representatives; and should that be pronounced to have happened, which in truth never did, third persons would not be injured. But whether a judgment alleged to have been delivered, was really delivered, and upon the alleged reasons, may affect all persons who are, or shall be, in circumstances similar to those of the parties to that cause. Yet it has somehow or other happened, that little or no care has been taken, nor any provisions made, to render the evidence of judicial proceedings certain and authentic.

The

The records of the court are, indeed, framed in such a manner as to constitute indisputable documents of such part of the proceedings as are comprised in them, but it is easy to shew that this goes but a very little way.

In the first place, the authority of a decision, for obvious reasons, is held to be next to nothing, if it passes *sub silentio*, without argument at the bar, or by the court; and it is impossible from the record of a judgment to discover whether the case was solemnly decided or not. Records, therefore, even when they contain a sufficient state of the case, do not afford complete evidence of what is requisite to the future authority of the decision.

But, in the second place, it is well known in how few instances the material parts of the state of the case can be gathered from the record. According to the modern usage, by far the greater number of the important questions agitated in the courts of law come before them upon motions for new trials, cases reserved, or summary applications of different sorts. In none of those instances does the record furnish even the evidence of the facts; for which, in such cases, there is no other repository, nor for the arguments and reasoning of the counsel and the court in any case, but the collections made by reporters*. On their fidelity and accuracy, therefore, the evidence of a very great part of the law of *England* almost entirely depends.

The most ancient compilations of this sort were the work of persons specially appointed for the purpose. In what particular manner they exercised their function, how far the courts superintended, or the judges assisted or revised their labours, no

* At an early period of our constitution, the reasons of the judgment were set forth in the record, but that practice has long been disused.

where

where appears ; and indeed almost every thing relating to them is involved in so much obscurity, that I believe their very names are totally unknown.

It is probable, however, that the cotemporary judges, and those who immediately followed them, had satisfactory reasons for confiding in the accuracy of these reporters, since their writings, called the *Year-books*, have always possessed a degree of traditional weight and authority superior to what is allowed to any subsequent reports.

This, indeed, is in some measure owing to the circumstances of their priority in point of time, exclusive of any consideration of peculiar authenticity or excellence, the decisions contained in them forming the basis of that large superstructure of successive determinations which now fills the library of an *English* lawyer.

The special office of reporter was discontinued so long ago as the beginning of the reign of *Henry VIII.* and the history of the judicial proceedings in *Westminster Hall*, from that time till now, would have been lost in oblivion, if it had not been for the voluntary industry of succeeding reporters.

The example was first set by some of the ablest judges and lawyers of the 16th century, who finding that official accounts were no longer taken of what passed in the courts of justice, were stimulated by a commendable zeal for that science of which they were distinguished ornaments, to commit to writing for the use of posterity, the history of the most important decisions which took place within their practice or observation.

Those eminent persons have had a numerous train of followers, of different descriptions, who, with unequal merit, and various success, have continued

continued down to the present times, a pretty regular series of decided cases.

In the reign of *James I.*, Lord Chancellor *Bacon* procured the revival of the ancient office of reporter, but it was soon dropped again, and does not seem while it continued to have been productive of the advantages expected from it. I know of no reports attributed to the persons then nominated to the office, except those printed in the name of Serjeant *Hetley*, who, as we are told in the title-page, was "*appointed by the King and Judges for one of the Reporters of the Law.*" Whether it was he or the Lord Keeper *Littleton* who was really the author of those Reports, (many of them being exact duplicates of those ascribed to *Littleton*,) they are far from bearing any marks of peculiar skill, information, or authenticity.

Soon after the Restoration, an act of parliament having prohibited the printing of law books without the licence of the Lord Chancellor, the two Chief Justices, and the Chief Baron, it became the practice to prefix a licence to all such reports published after that period, in which it was usual for the rest of the Judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. The act was renewed from time to time, but finally expired in the reign of King *William*. But the same form of licence and testimonial continued in use till not many years ago; when, as the one had become unnecessary, and the other was only a general commendation of the writer, and no voucher for the merit of the work, the Judges, I believe, came to a resolution, not to grant them any longer; and, accordingly, the more recent Reports have appeared without them.

I leave to others the enquiry into the reasons why the law has not provided some method of handing

handing down its decisions to future times, more solemn and authentic than what is now known, or indeed seems ever to have existed; and I proceed to state to the reader the means I have employed to render the following reports as faithful, correct, and useful, as it was in my power to make them.

When the question arose upon the pleadings, or was connected with them, there is hardly an instance where I have not been favoured, in the most obliging manner, with the paper-book, as it is called; that is, a copy of the record itself. In like manner, I have been supplied with copies of almost all the special verdicts, cases reserved, and material rules, affidavits, and exhibits. I have also had the most ready access to consult and transcribe whatever I thought necessary, in the Crown Office, or that of the clerk of the rules, as well as the cases sent from the Court of Chancery, and the certificates of the court upon them.

One of the greatest difficulties I had to encounter was, in obtaining a complete state of the facts when the case came on in the shape of a motion for a new trial. I was obliged, on such occasions, to collect them, on the sudden, as they were read from the report of the Judge, and frequently without any previous knowledge of the cause. Some of the most essential circumstances, which had escaped me at first, I was perhaps able to recover afterwards, from the observations made upon them by the counsel or the court. But then, in endeavouring to catch the facts in that manner, I was in great danger of losing the chain of the argument. It has been my study to remedy these inconveniencies by every means within my reach. The briefs of counsel have never been withheld from me; but though they are extremely useful and safe, where exhibits are to be set forth or abridged, as deeds, bills of exchange, policies of insurance, &c. they cannot be resorted to, but with the utmost caution, for the parole testimony
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in a cause. Yet even there, they have often served to explain an ambiguity, or supply an omission, in the notes I had taken in court. In all cases I have had it in my power to collate my own notes of the evidence with those of a great many of my friends at the bar; frequently with those of the counsel who were concerned in the cause.

In considering what is the best *method* of reporting, I found that different writers had proceeded upon plans widely different from one another.

Some have prefixed, to all the leading cases, a full copy of the pleadings, thereby rendering their work at the same time a book of *entries*, and of reports. It was once my intention to have done so, but I was dissuaded from it by much better opinions than my own.

Some have not only stated the facts at great length, but have given the arguments of counsel almost as diffusely as they were delivered at the bar, distinguishing the speeches of the different advocates on the same side, separately, under the names of each.

Others, on the contrary, have only given a very abridged state of the case, together with the mere point decided, omitting not only all the arguments at the bar, but also most of the reasoning of the court.

Each of these two methods has its partizans, and each has its peculiar advantages and disadvantages.

The first is more instructive for the younger part of the profession; it exhibits a more complete picture of the case, and does more justice to the learning and ingenuity of the several advocates.

But, on the other hand, its prolixity fatigues the attention, it abounds with repetitions, and
often

often disgusts the experienced lawyer, by a detail of elementary principles, trivial arguments, and hackneyed authorities.

I have endeavoured to steer a middle course between those two extremes.

1. I have been particularly attentive to state whatever was material in the pleadings or evidence; and sometimes, where I was afraid of omitting what might be deemed essential, I have set forth *verbatim*, a case, a plea, or a special verdict.

2. I have thrown together, into one discourse, the arguments which were used by all the different counsel who spoke on the same side, digesting them in the order which seemed to me to give them the greatest effect. In following this plan, as I have been often obliged to cloath the thoughts of others in language of my own, so I have been rather solicitous to preserve what appeared weighty and important in point of reasoning and authority, than anxious to retain every thing that was said. But I have taken care to omit no cited cases which I have found upon examination to be materially applicable to the point in question.

3. The judgments of the court I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write short-hand, nor very quickly. Memory, however, while the case was recent, supplied at home, many of the chasms which I had left in court; and, by comparing, and as it were confronting a variety of notes taken by others, with my own, I was frequently enabled to recall, and insert in my report, material passages which I should otherwise have lost. Thus I have profited in several respects by the liberal communications and concurrent labours of others of the profession, some of them persons of the first eminence at the bar. I acknowledge the assistance I have

have received from them with satisfaction and pride. If this book should meet with any degree of approbation, they are fairly entitled to a great share of it; and I should with pleasure declare that some of my friends ought, almost as much as myself, to be considered as the authors, were it not that I might thereby seem desirous to involve them in my responsibility for its imperfections.

4. I have carefully consulted the original authors for all the cases cited, and have bestowed all possible attention to see the names and references correctly printed.

5. To avoid unnecessary repetition, I have omitted the frequent conclusions of "*per cur. unanimiter*," "*unanimously*," &c. and therefore I take this opportunity of mentioning, that the unanimity of the court is to be understood, in every case where I have not expressly stated a difference of opinion.

6. It is usual with some reporters to give an account of different stages of the same cause, or of arguments in the same case, but delivered at different times in different parts of their reports, according to strict chronological order. This seems to me to give them too much the appearance of being the mere transcripts of their note-books. I have, therefore, thought it more advisable to bring every thing respecting the same case into one point of view, by stating the whole together, and inserting it on the day on which the case was ultimately disposed of; distinguishing, however, the different stages of the cause, and marking the particular dates of each.

7. It may be proper to mention the reason why I have so rarely given an account of decisions relative to the granting or refusing discretionary costs: It is, because such decisions depend for the most part on particular circumstances, and therefore

fore cannot operate as precedents or authorities on other occasions.

8. One or two cases reported by me have come on, at first, in the court of *King's Bench*, or elsewhere, at a time prior to the period to which I have confined myself, and one or two have been heard again and decided upon, in another form, or some subsequent stage, posterior to that period. Of these, where I have been able, I have completed the history, by stating the more early or later proceedings in the notes.

9. I have also printed in the notes several original cases, which were either cited, or seemed to be applicable to the point of the case I was then reporting. For this I trust no apology is necessary, though many of them will soon probably be laid before the public, more fully and correctly, in reports now preparing by another gentleman, and appropriated to the period in which they were determined*.

10. But I am not without the apprehension of meeting with some degree of censure for having on different occasions given a place, in the notes, to arguments and observations of my own. I trust I have throughout avoided the appearance, as I certainly never entertained the design of discussing or controverting the solemn judgments of the court. This, it is true, was both recommended and practised by Mr. Justice *Foster*, in his Reports, but I cannot help thinking it is very far from being any part of the reporter's province. At least, what might become a Judge of his established reputation, would have been extremely unbecoming in me. I have merely attempted, in some places, to illustrate or confirm the doctrines laid down in the text, by authorities which have occurred to me in the course of my reading, or arguments which the subject matter may have

* Mr. *Cowper's* Reports were published soon after these, and are often referred to in this edition,

suggested.

suggested. Sometimes, though rarely, I have entered into the consideration of general legal questions; but if the reader is not too severe a critic, he will have some indulgence for that part of the notes, as no ideas of my own have been suffered to obtrude themselves upon him in the text. I own I thought it an unnecessary, as I should have felt it to be an irksome restraint, in a work consisting of near 800 pages, and containing such a variety of reasoning on subjects extremely diversified, and often highly interesting to a lawyer, to confine myself so rigidly to the mere business of reporting, as never once, even at the bottom of the page, to have mentioned what might occur to myself on any of those subjects.

11. To attain in some degree the advantages already hinted at of the more concise species of reports, I have, after the example of some of my predecessors, inserted, on the margin, an abstract of the principal point or points of every case. The plan on which I have formed those abstracts has been, to state the point as a general rule or position. This method, upon the whole, seems to be the most useful, though it has its inconveniences. Where a case turns upon a complication of facts, not likely ever again to be combined together, a proposition including all those facts, and purporting to be a general rule of law, has an uncouth and awkward appearance. However, in such cases, I have sacrificed particular propriety to general uniformity.

12. The table of matters has been framed with a view to render it a sort of alphabetical Digest of the contents, and as I wish that on many occasions these reports may save the reader the trouble of recurring to others, I have mentioned not only the points adjudged in the cases I have reported, but also those cited from prior authorities and determinations. There are times when this may prove of considerable use to the practising lawyer. It is unnecessary to tell the student, that he ought always to find leisure to consult the originals.

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13. In addition to the usual index of cases reported, I have prefixed another of those cited or stated at large in the text or notes. If this should not prove of the advantage I intended, I shall have to regret that I employed a good deal of time upon it, in a manner certainly extremely dry and unentertaining. But I cannot but flatter myself that it will furnish an useful *Repertorium* of all the important cases that were cited and relied upon in the court of *King's Bench* during a period of three years, which must amount to a great proportion of the principal common-law authorities. Besides, as, in most instances, the material parts of the cited cases are abstracted in some one of the reported cases, and in many parts of the work several of them are observed upon, and explained, this index, by enabling the reader to bring every thing relative to the same case under his review at once, will supply him with valuable *Readings* and commentaries upon most of them.

Thus I have explained the nature and plan of this volume. I now dedicate and consign it to the use of my profession. If it has at all done justice to the great judicial qualities of those who at present fill the Bench, it will be acceptable to my contemporaries and posterity. If I have failed in that respect, those qualities are so universally felt and acknowledged, that no reputation can suffer but my own. Even with regard to myself, whatever may be the success of the work, the intention, at least, cannot meet with disapprobation; being no other than to render some service to the public, by communicating to lawyers in general, the fruits of my private industry and labour. The nature of the undertaking precludes that sort of ambition by which authors are so often animated; and my utmost aim will be attained, if I shall be found to have merited, in any degree, the humble praise of useful accuracy: *Ubi ingenio non erat locus, curæ testimonium promeruisse contentus,*

ADVER.

ADVERTISEMENT

TO THE

SECOND EDITION.

THE additions which have been made to the following work will be obvious to the reader. As a new impression was called for, it would have been unpardonable not to aim at improvement. But it was due to those who are possessed of the former edition, to render this as little prejudicial to its value as possible. On that account, the new cases, notes, and references, have been printed in a detached pamphlet, on paper of the same size with the first edition. From the length of some of the additional notes, new pages were found necessary, otherwise the same *number* would have extended sometimes to several leaves, and, though that has been practised in the enlarged editions of some law books, it is a method which seems to me not fit to be imitated; because it defeats, in a great degree, the end of numbering the pages. But the pages of the former edition are marked on the margin of this, and the pages of this may be written on the margin of the former: by which means, cases or passages cited according to the one or the other, will be found without difficulty in either. Some may think, the enlarged size of the work has rendered it too bulky for one volume; two title pages, therefore, are printed, that those who chuse may have it bound up in two.

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Jan. 1, 1786.

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1990

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

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TO THIS

THIRD EDITION.

A NEW impression of these Reports being called for, it has been thought adviseable to print them in octavo, as that form seems now to be generally thought the most convenient. The reader will find some additional notes and references in this edition, but they are not numerous enough, nor of sufficient importance, to be printed apart, as was done with respect to the former additions.

LINCOLN'S INN,
Jan. 1, 1791.

ADLER & SONS

1948

[The page contains extremely faint, illegible text, likely bleed-through from the reverse side. A large, dark, irregular smudge or ink blot is visible near the center-right of the page.]

2000

INDEX

OF

CASES REPORTED.

A	Page.
A BBOT <i>against</i> Plumbe. - -	216 to 217
Abernethy <i>against</i> Landale. - -	539—542
Abingdon (Den, lessee of Taylor, <i>against</i> the Earl of - -	473—476
Ackworth <i>against</i> Kempe. - -	40—43
Adderley (the King <i>against</i>) - -	463—465
Ailesbury (the Earl of) <i>against</i> Pattison. - -	28—30
Ailway <i>against</i> Burrows. - -	263, 264
Alfop <i>against</i> Brown. - -	192
— <i>against</i> Price. - -	160—168
Alston (Goodright, lessee of) <i>against</i> Wells. - -	771—780
Ambrose (Hodgson <i>against</i>) - -	337—345
Ancher <i>against</i> the Bank of England. - -	637—641
Ansell (Hafelar <i>against</i>) - -	197
Armistead <i>against</i> Philpot. - -	231
Aspinall (Rushon <i>against</i>) - -	679—684
Attle (Grant <i>against</i>) - -	722—732
Ayres <i>against</i> Wilson. - -	385, 386

B

Bache <i>against</i> Proctor. - -	382—384
Bacomb (Payne <i>against</i>) - -	651
Bailly <i>against</i> Wilkinson. - -	671
Baldwin (Willis <i>against</i>) - -	450, 451
Bank of England (Ancher <i>against</i> the) - -	637—641
— (the King <i>against</i> the) on the prosecution of Parbury. - -	524—527
	Bannister

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Bannister (<i>Webster against</i>)	- 393 to 397
Barber <i>against</i> Fletcher.	- 305, 306
— <i>against</i> French.	- 294
Barkley (<i>Jones against</i>)	- 684—698
Barlow (<i>Birt against</i>)	- 171—175
Barnfather <i>against</i> Jordan.	- 452
Barrat (<i>the King against</i>)	- 465, 466
Bate (<i>the King against</i>) on the prosecution of the Duke of Richmond.	- 387—391
Bean <i>against</i> Stupart.	- 10—14
Beasley (<i>Fisher against</i>)	- 235—237
Bermon <i>against</i> Woodbridge.	- 781—790
Bernardi <i>against</i> Motteux.	- 575—583
Billington (<i>Goodtitle, lessee of Winckles, against</i>)	- 753—758
Birkbeck (<i>Cort against</i>)	- 218—225
Birmingham (<i>the King against the Inhabitants of</i>)	333—336
Birt <i>against</i> Barlow.	- 171—175
Bize <i>against</i> Fletcher.	- 284—291
Blackburne (<i>Cornu against</i>)	- 641—650
Blacquiére <i>against</i> Hawkins.	- 378—381
Boats <i>against</i> Edwards.	- 227, 228
Borthwick (<i>the King against</i>)	- 207—212
Bourdieu (<i>Lowry against</i>)	- 468—472
Boyce <i>against</i> Whitaker.	- 94—97
Boydell (<i>Simond against</i>)	- 268—271
— (<i>Wooldridge against</i>)	- 16—18
Bradbuty <i>against</i> Wright.	- 624—628
Bradford <i>against</i> Foley.	- 63—67
Brady (<i>lessee of Norris against</i> Cubitt.	- 31—40
Branch <i>against</i> Ewington.	- 518, 519
Brecknock (<i>Mauricet against</i>)	- 509, 510
Bree <i>against</i> Holbech.	- 654—657
Bridge (<i>Oxley against</i>)	- 67
— (<i>Syers against</i>)	- 527—531
Bristow (<i>Fisher against</i>)	- 215
Bristow <i>against</i> Wright.	- 665—669
Brown (<i>Alsop against</i>)	- 192
— <i>against</i> Bullen.	- 407—410
— (<i>Holmes, lessee of against</i> Brown.	- 437, 438
— (<i>Richards against</i>)	- 114—116
— <i>against</i> Rivers.	- 472, 473
Bulkeley (<i>Ren, lessee of Hall, against</i>)	- 292, 293
Bullen (<i>Brown against</i>)	- 407—410
Burnell <i>against</i> Martin.	- 417, 418
— (<i>Walker against</i>)	- 317—320
Burrows (<i>Ailway against</i>)	- 263, 264
	Butcher

INDEX OF CASES REPORTED.

xxiii

	Pages.
Butcher (Doe, lessee of Simpson, <i>against</i>)	50 to 54
— <i>against</i> Easto.	295—297
— <i>against</i> Green.	677, 678

C

Calze (Robson <i>against</i>)	228—231
Campion (Pearson <i>against</i>)	629
Carmichael (Wilkins <i>against</i>)	101—105
Carrington (Stevens <i>against</i>)	27, 28
Cater (Right, lessee of) <i>against</i> Price.	241—244
Cator (Goodright, lessee of Hare, <i>against</i>)	477—486
Chancellor <i>against</i> Poole.	764—767
Chandler <i>against</i> Roberts.	58—61
Clarges (Goodtitle, lessee of) <i>against</i> Funucan.	565—575
Clegg <i>against</i> Molyneux.	780, 781
Cloutman (Woolley <i>against</i>)	244—246
Cocksedge <i>against</i> Fanshaw.	119—134
Cogan (Hyde <i>against</i>)	699—707
Coghlan <i>against</i> Williamson.	93
Cole (<i>Ex parte</i>)	114
Coles (the King <i>against</i>)	420
Comerford <i>against</i> Price.	312—314
Company of Carpenters, &c. (the) <i>against</i> Hayward.	374, 375
Cope <i>against</i> Cooke.	467, 468
Cooke (Cope <i>against</i>)	467, 468
Corhampton (the King <i>against</i> the Inhabitants of)	621, 622
Cornu <i>against</i> Blackburne.	641—650
Cort <i>against</i> Birkbeck.	218—225
Cotterel <i>against</i> Hooke.	97—101
Cozens (the King <i>against</i>)	426—428
Cubitt (Brady, lessee of Norris, <i>against</i>)	31—40

D

Dallas (Thornton <i>against</i>)	46—49
Dallison (Wiglesworth <i>against</i>)	210—207
Dalby (Devenege <i>against</i>)	384
Davidson (Eddie <i>against</i>)	650, 651
Davie (the King <i>against</i>)	588—590
— <i>against</i> Stevens.	321—324
Dawes (Hoare <i>against</i>)	371—373
Den (lessee of Taylor) <i>against</i> the Earl of Abingdon.	473—476
	Devenege

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Devenege <i>against</i> Dalby.	384
Devon <i>against</i> Watts.	86 to 93
Dingwall <i>against</i> Dunster.	247—250
Docking (Goodright, lessee of) <i>against</i> Dunham.	264—268
Doe (lessee of Fonnereau) <i>against</i> Fonnereau.	487—509
— (lessee of Gibbons) <i>against</i> Pott.	710—722
— (lessee of Matthews) <i>against</i> Jackson.	175, 176
— (lessee of Simpson) <i>against</i> Butcher.	50—54
— (lessee of Watson) <i>against</i> Shippard.	75—79
Dovers (Smith <i>against</i>)	428—431
Downes (Weston <i>against</i>)	23—25
Duncan <i>against</i> Thomas.	196
Dunham (Goodright, lessee of Docking, <i>against</i>)	264—268
Dunster (Dingwall <i>against</i>)	247—250

E

Earl <i>against</i> Harris.	357—359
East India Company (Hotham <i>against</i> the)	272—278
Easto (Butcher <i>against</i>)	295—297
Eaton <i>against</i> Jaques.	445—463
Eddie <i>against</i> Davidson.	650, 651
Eddowes <i>against</i> Hopkins.	376—378
Eden (Le Caux <i>against</i>)	594—620
— <i>against</i> Parkinson.	732—736
Edwards (Boats <i>against</i>)	227, 228
<i>Ex parte</i> Cole.	114
Ewer (Lilly <i>against</i>)	72—74
Ewington (Branch <i>against</i>)	518, 519

F

Fane (the King <i>against</i> Lyme Regis, on the prosecution of)	135—137
Fane and Luther (the King <i>against</i> Lyme Regis, on the prosecution of)	149—160
Fanshaw (Cocksedge <i>against</i>)	119—134
Ferguson (Thelluston <i>against</i>)	361—370
Fisher <i>against</i> Beasley.	235—237
— <i>against</i> Bristow.	215
— (Tarlton <i>against</i>)	671—677
Fletcher (Barber <i>against</i>)	305, 306
— (Bize <i>against</i>)	284—291
— (Hurd <i>against</i>)	43—45
— Milles <i>against</i>)	231—235
Fletcher	

INDEX OF CASES REPORTED.

xxv

	Pages.
Fletcher (<i>Planché against</i>)	251 to 254
——— (<i>Thellusson against</i>)	315, 316
Foley (<i>Bradford against</i>)	63—64
Fonnereau (<i>Doe, lessee of</i>) <i>against</i> Fonnereau.	487—509
Forlyth (<i>Stone against</i>)	707—709
Fowler (<i>Goodtitle, lessee of</i>) <i>against</i> Welford.	139—141
Frampton (<i>the King against</i> the Inhabitants of)	418, 419
Frazer (<i>Maddowall against</i>)	260—262
Freckleton (<i>Yates against</i>)	623, 624
French (<i>Barber against</i>)	294
Frith (<i>Williams against</i>)	198
Funuſan (<i>Goodtitle, lessee of Clarges, against</i>)	565—575
Furly <i>against</i> Newnham.	419, 420

G

Gallimore (<i>Moss against</i>)	279—283
Gibbons (<i>Doe, lessee of</i>) <i>against</i> Pott.	710—722
Gilby <i>against</i> Lockyer.	217, 218
Gloucestershire (<i>the King against</i> the Justices of)	191
Goodright (<i>lessee of Alston</i>) <i>against</i> Wells	771—780
——— (<i>lessee of Docking</i>) <i>against</i> Dunham.	264—268
——— (<i>lessee of Hare</i>) <i>against</i> Cator.	477—486
Goodtitle (<i>lessee of Clarges</i>) <i>against</i> Funuſan.	565—575
——— (<i>lessee of Fowler</i>) <i>against</i> Welford.	139—141
——— <i>against</i> North.	584, 585
——— (<i>lessee of Winckles</i>) <i>against</i> Billington.	753—758
Godwin (<i>the King against</i>)	397—401
Gordon (<i>the King against</i> Lord George)	590—594
Gough (<i>the King against</i>)	791—798
Grant <i>against</i> Aſtle.	722—732
Gray's Inn (<i>the King against</i>) on the proſecution of Hart.	353—357
Greaves (<i>the King against</i>)	632, 633
Green (<i>Butcher against</i>)	677, 678
Grindley <i>against</i> Holloway.	307, 308

H

Hall (<i>Keech, lessee of Warne, against</i>)	21—23
——— (<i>Ren, lessee of</i>) <i>against</i> Bulkeley.	292, 293
Hanwood (<i>the King against</i> the Inhabitants of)	439—441
Hare (<i>Goodright, lessee of</i>) <i>against</i> Cator.	477—486
Harris (<i>Earle against</i>)	357—359

Hart

	<i>Pages.</i>
Hart (the King <i>against</i> Gray's Inn, on the prosecution of)	353 to 357
Hartley (Roberts <i>against</i>)	311, 312
Hafelar <i>against</i> Ansell.	197
Haffell (Jackson <i>against</i>)	330
Hafwell (the King <i>against</i>) on the prosecution of the Duke of Richmond.	387—391
Hatch (Holford <i>against</i>)	183—184
Hawkins (Blacquiere <i>against</i>)	378—381
— <i>against</i> Magnall.	466, 467
— (Polyblank <i>against</i>)	329, 330
Hayley <i>against</i> Riley.	71, 72
Hayward (the Company of Carpenters, &c. <i>against</i>)	374, 375
Heaward <i>against</i> Hopkins.	448, 449
Heckmondwicke (the King <i>against</i> the Inhabitants of)	564
Hind (Martin <i>against</i>)	142—148
Hoare <i>against</i> Dawes.	371—373
Hodges <i>against</i> Middleton.	431—435
Hodgson <i>against</i> Ambrose.	337—345
Holbech (Bree <i>against</i>)	238, 239
Hole (Welsh <i>against</i>)	238, 239
Holford <i>against</i> Hatch.	183—188
Holloway (Grindley <i>against</i>)	307—308
Holmes (lessee of Brown) <i>against</i> Brown.	437, 438
Honeywood (Ward <i>against</i>)	61—63
Hooke (Cotterell <i>against</i>)	97—101
Hooper <i>against</i> Till.	198—200
Hopkins (Eddowes <i>against</i>)	376—378
— (Heaward <i>against</i>)	448, 449
Hotham <i>against</i> the East India Company.	272—278
Hulland (the King <i>against</i> the Inhabitants of)	657, 658
Hulse (Stracy <i>against</i>)	411—417
Hunt (Mason <i>against</i>)	297—300
Hurd <i>against</i> Fletcher.	43—45
Hyde <i>against</i> Cogan.	699—707

I

Jackson (Doe, lessee of Mathews, <i>against</i>)	175, 176
— <i>against</i> Haffell.	330
Jaques (Eaton <i>against</i>)	445—463
Janfon <i>against</i> Willson.	257—260
Jeffery <i>against</i> White.	476, 477
Jles (Pearson <i>against</i>)	556—561
	Johnson

INDEX OF CASES REPORTED.

xxvii

	Pages.
Johnson (<i>Megit against</i>)	542 to 548
— (<i>Simplon against</i>)	7—10
Johnston <i>against</i> Sutton.	254, 255
Jones <i>against</i> Barkley.	684—698
— (<i>the King against</i>)	300—302
— <i>against</i> Maunfell.	302—305
— (<i>Penry against</i>)	213
— <i>against</i> Williams.	214, 215
Jordan (<i>Barnfather against</i>)	452

K

Keech (<i>lessee of Warne against</i> Hall.	21—23
Kempe (<i>Ackworth against</i>)	40—43
Kennoway (<i>Noble against</i>)	510—513
Kenny (<i>Longchamp against</i>)	137—139
King (<i>the against</i> Adderley.	463—465
— <i>against</i> the Bank of England, on the pro-	
secution of Parbury.	524—527
— <i>against</i> Barratt.	465, 466
— <i>against</i> Bate, on the prosecution of the	
Duke of Richmond.	387—391
— <i>against</i> the Inhabitants of Birmingham.	333—336
— <i>against</i> Borthwick.	207—212
— <i>against</i> Coles.	420
— <i>against</i> the Inhabitants of Corhampton.	621, 622
— <i>against</i> Cozens.	426—428
— <i>against</i> Davie.	588—590
— <i>against</i> the Inhabitants of Frampton.	418, 419
— <i>against</i> the Justices of Gloucestershire.	191
— <i>against</i> Godwin.	397—401
— <i>against</i> Lord George Gordon.	590—594
— <i>against</i> Gough.	791—798
— <i>against</i> Gray's Inn, on the prosecution of	
Hart.	353—357
— <i>against</i> Greaves.	632, 633
— <i>against</i> Haswell, on the prosecution of the	
Duke of Richmond.	387—391
— <i>against</i> the Inhabitants of Hanwood.	439—441
— <i>against</i> the Inhabitants of Heckmond-	
wicke.	564
— <i>against</i> the Inhabitants of Hulland.	657, 658
— <i>against</i> Jones.	300—302
— <i>against</i> the Inhabitants of Leigh.	46
— <i>against</i> Lyme Regis, on the prosecution	
of Fane.	135—137
	King

INDEX OF CASES REPORTED.

	<i>Pages.</i>
King (the) <i>against</i> Lyme Regis, on the prosecution of Fane and Luther.	149 to 160
— <i>against</i> Lyme Regis, on the prosecution of Mitchell.	79—86
— <i>against</i> Lyme Regis, on the prosecution of Raymond.	177—182
— <i>against</i> May.	193—195
— <i>against</i> Miles.	284
— <i>against</i> Morgan.	314
— <i>against</i> the Inhabitants of Northfield.	659—661
— <i>against</i> the Inhabitants of North Shields.	331—333
— <i>against</i> Pitts.	662—664
— <i>against</i> Pugh.	188—191
— <i>against</i> Read.	486, 487
— <i>against</i> Routledge.	531—538
— <i>against</i> the Inhabitants of St. John's Southwark.	225—227
— <i>against</i> the Inhabitants of St. Michael's in Bath.	630—632
— <i>against</i> the Inhabitants of Sandwich, otherwise Swannage.	562, 563
— <i>against</i> Smith.	441—446
— <i>against</i> the Inhabitants of Stockland.	70, 71
— <i>against</i> Stratton.	239—241
— <i>against</i> the Inhabitants of Swannage, otherwise Sandwich.	562, 563
— <i>against</i> Toms.	401—406
— <i>against</i> Townshend.	421, 422
— <i>against</i> the Inhabitants of Under Barrow.	309—311
— <i>against</i> the Inhabitants of Uttoxeter.	346—350
— <i>against</i> Vaughan.	516, 517
— <i>against</i> Wavell.	116—118
— <i>against</i> Wheatman.	345, 346
— <i>against</i> the Inhabitants of Winchcomb.	391—393
— <i>against</i> Whitbread.	549—555
— <i>against</i> the Inhabitants of Wivelingham.	767—770
— <i>against</i> the Justices of Yorkshire.	192, 193
Kinnerley <i>against</i> Orpe.	56—58
— <i>against</i> William Orpe.	517, 518
Kirk <i>against</i> Strickland.	449, 450

L

Landale (Abernethy <i>against</i>)	539—542
Langstaffe (Russel <i>against</i>)	515—516
Langton (Zinck <i>against</i>)	749—753
	Lavabre

INDEX OF CASES REPORTED.

XXIX

	Pages.
Lavabre <i>against</i> Walter.	284 to 291
— <i>against</i> Wilfon.	284—291
Layton <i>against</i> Pearce.	15, 16
Le Caux <i>against</i> Eden.	594—620
Le Chevalier <i>against</i> Lynch.	170, 171
Lee <i>against</i> White.	256
Leigh (the King <i>against</i> the Inhabitants of)	46
Lench <i>against</i> Pargiter.	68, 69
Lilly <i>against</i> Ewer.	72—74
Linzec (Wemys <i>against</i>)	324—328
Lloyd <i>against</i> Skutt.	350—353
— (Wiltshire <i>against</i>)	381, 382
Lockyer (Gilby <i>against</i>)	217, 218
Longchamp <i>against</i> Kenny.	137—139
Lorraine <i>against</i> Thomlinson.	585—588
Lowe <i>against</i> Waller.	736—744
Lowry <i>against</i> Bourdieu.	468—472
Luther (the King <i>against</i> Lyme Regis, on the prosecution of Fane and)	149—160
Luxton <i>against</i> Robinson.	620, 621
Lyme Regis (the King <i>against</i>) on the prosecution of Fane.	135—137
— (the King <i>against</i>) on the prosecution of Fane and Luther.	149—160
— (the King <i>against</i>) on the prosecution of Mitchell.	79—86
— (the King <i>against</i>) on the prosecution of Raymond.	177—182
Lynch (Le Chevalier <i>against</i>)	170, 171

M

Macdowall <i>against</i> Frazer.	260—262
Macpherson <i>against</i> Rorison.	217
Magnall (Hawkins <i>against</i>)	466, 467
Martin (Burnell <i>against</i>)	417, 418
Martyn <i>against</i> Hind.	142—148
Mason <i>against</i> Hunt.	297—300
— <i>against</i> Skurray.	438
Matthews (Doe, lessee of) <i>against</i> Jackson.	175, 176
Maunsell (Jones <i>against</i>)	302—305
Mauricet <i>against</i> Brecknock.	509, 510
May (the King <i>against</i>)	193—195
Mayor (Milford <i>against</i>)	55
Megit <i>against</i> Johnson.	542—548
Middleton (Hodges <i>against</i>)	431—435
	Miles

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Miles (the King <i>against</i>)	284
Milford <i>against</i> Mayor.	55
Milles <i>against</i> Fletcher.	231 to 235
Mitchell (the King <i>against</i> Lyme Regis, on the prosecution of)	79—86
—— (Right, lessee of) <i>against</i> Sidebotham.	759—764
Molyneux (Clegg <i>against</i>)	780, 781
Montague (Sullivan <i>against</i>)	106—113
Morgan (the King <i>against</i>)	314
Moss <i>against</i> Gallimore.	279—283
Motteux (Bernardi <i>against</i>)	575—583

N

Newnham (Furly <i>against</i>)	419, 420
Noble <i>against</i> Kennoway.	510—513
Norris (Brady, lessee of) <i>against</i> Cubitt.	31—40
North (Goodtitle <i>against</i>)	584, 585
Northfield (the King <i>against</i> the Inhabitants of)	659—661
North Shields (the King <i>against</i> the Inhabitants of)	331—333

O

Ogden (Waters <i>against</i>)	452—455
Orpe (Kinnerley <i>against</i>)	56—58
Orpe William (Kinnerley <i>against</i>)	517, 518
Oxley <i>against</i> Bridge.	67

P

Paget <i>against</i> Wheate.	669—671
Farbury (the King <i>against</i> the Bank of England, on the prosecution of)	524—527
Pargiter (Lench <i>against</i>)	68, 69
Parkinson (Eden <i>against</i>)	732—736
Pattison (the Earl of Ailesbury <i>against</i>)	28—30
Payne <i>against</i> Bacomb.	651
—— <i>against</i> Rogers.	407
—— (Samuel <i>against</i>)	359, 360
Peacock <i>against</i> Rhodes.	633—636
Pearce (Layton <i>against</i>)	15, 16
Pearson <i>against</i> Campion.	629
Pearson	

INDEX OF CASES REPORTED.

xxxi

	Pages.
Pearson <i>against</i> Iles.	556 to 561
Penry <i>against</i> Jones.	213
Philpot (<i>Armistead against</i>)	231
Pitts (the King <i>against</i>)	662—664
Planché <i>against</i> Fletcher.	251—254
Plumbe (Abbot <i>against</i>)	216, 217
Polyblank <i>against</i> Hawkins.	329, 330
Poole (Chancellor <i>against</i>)	764—767
Popham (Roe, lessee of Roach, <i>against</i>)	25, 26
Pott (Doe, lessee of Gibbons, <i>against</i>)	710—722
Powell <i>against</i> White.	169
Price (Alfop <i>against</i>)	160—168
— (Right, lessee of Cater, <i>against</i>)	241—244
— (Comerford <i>against</i>)	312—314
Pritchard <i>against</i> Pugh.	262, 263
Proctor (Bache <i>against</i>)	382—384
Pugh (the King <i>against</i>)	188—191
— (Pritchard <i>against</i>)	262, 263

R

Raymond (the King <i>against</i> Lyme Regis, on the prosecution of)	177—182
Rayner (Wortley <i>against</i>)	637
Read (the King <i>against</i>)	486, 487
— <i>against</i> Willan.	422—426
Ren, (lessee of Hall,) <i>against</i> Bulkeley.	292, 293
Rex. <i>Vide</i> King.	
Rhodes (Peacock <i>against</i>)	633—636
Richards <i>against</i> Brown.	114—116
Richmond (the King <i>against</i> Bate, on the prosecution of the Duke of)	387—391
Richmond (the King <i>against</i> Hafwell, on the prosecution of the Duke of)	387—391
Right (lessee of Cater) <i>against</i> Price.	241—244
— (lessee of Mitchell) <i>against</i> Sidebotham.	759—764
Riley (Hayley <i>against</i>)	71, 72
Rivers (Brown <i>against</i>)	472, 473
Roach (Roe, lessee of) <i>against</i> Popham.	25, 26
Roberts (Chandler <i>against</i>)	58—61
— <i>against</i> Hartley.	311, 312
Robinson (Luxton <i>against</i>)	620, 621
Robson <i>against</i> Calze.	228—231
Roe (lessee of Roach) <i>against</i> Popham.	25, 26
Rogers (Payne <i>against</i>)	407
Rorison (Macpherson <i>against</i>)	217

Routledge

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Routledge (the King <i>against</i>)	531 to 538
Rufhton <i>against</i> Aspinall.	679—684
Ruffel <i>against</i> Langstaffe.	515—516

S

Saint John's Southwark (the King <i>against</i> the Inhabitants of)	225—227
Saint Michael's in Bath (the King <i>against</i> the Inhabitants of)	630—632
Samuel <i>against</i> Payne.	359, 360
Sandwich or Swannage (the King <i>against</i> the Inhabitants of)	562, 563
Sealy (White <i>against</i>)	49, 50
Shippard (Doe, lessee of Watfon, <i>against</i>)	75—79
Shirley (Trinder <i>against</i>)	45, 46
Sidebotham (Right, lessee of Mitchell, <i>against</i>)	759—764
Simond <i>against</i> Boydell.	268—272
Simpson (Doe, lessee of) <i>against</i> Butcher.	50—54
— <i>against</i> Johnson.	7—10
Skurray (Mafon <i>against</i>)	438
Skutt (Lloyd <i>against</i>)	350—353
Smith <i>against</i> Dovers.	428—431
— (the King <i>against</i>)	441—446
Staples (Thelluffon <i>against</i>)	438, 439
Stevens <i>against</i> Carrington.	27, 28
— (Davie <i>against</i>)	321—324
Stockland (the King <i>against</i> the Inhabitants of)	70, 71
Stone <i>against</i> Forsyth.	707—709
Stracy <i>against</i> Hulse.	411—417
Stratton (the King <i>against</i>)	239—241
Strickland (Kirk <i>against</i>)	449, 450
Stuart <i>against</i> Wilkins.	18—21
Stupart (Bean <i>against</i>)	11—14
Sullivan <i>against</i> Montague.	106—113
Sutton (Johnston <i>against</i>)	254, 255
Swannage or Sandwich (the King <i>against</i> the Inhabitants of)	562, 563
Syers <i>against</i> Bridge.	527—531

T

Tarlton <i>against</i> Fisher.	671—677
Taylor, (Den, lessee of) <i>against</i> the Earl of Abingdon.	473—476
	Taylor

INDEX OF CASES REPORTED.

xxiii

	Pages.
Taylor <i>against</i> Whitehead.	745-749
Thellusson <i>against</i> Fergusson.	384-376
— <i>against</i> Fletcher.	315-316
— <i>against</i> Staples.	438-439
Thomas (Duncen <i>against</i>)	196
Thomlinson (Loraine <i>against</i>)	585-588
Thornton <i>against</i> Dallas.	46-49
Till (Hooper <i>against</i>)	198-200
Toms (the King <i>against</i>)	401-406
Townshend (the King <i>against</i>)	421-422
Trinder <i>against</i> Shirley.	45-46

U

Under Barrow (the King <i>against</i> the Inhabitants of)	309-311
Uttoxeter (the King <i>against</i> the Inhabitants of)	346-350

V

Vaughan (the King <i>against</i>)	516, 517
------------------------------------	----------

W

Walker <i>against</i> Burnell.	317-320
— <i>against</i> Witter.	1-7
Waller (Lowe <i>against</i>)	736-744
Walter (Lavabre <i>against</i>)	284-291
Ward <i>against</i> Honeywood.	61-63
Warne (Keech, lessee of) <i>against</i> Hall.	21-23
Wase <i>against</i> Wyburd.	246-247
Waters <i>against</i> Ogden.	452-455
Watson (Doe, lessee of) <i>against</i> Shippard.	75-79
Watts <i>against</i> Devon.	86-93
Wavell (the King <i>against</i>)	116-118
Webster <i>against</i> Bannister.	393-397
Welford (Goodtitle, lessee of Fowler, <i>against</i>)	139-141
Wells (Goodright, lessee of Alston, <i>against</i>)	771-780
Welsh <i>against</i> Hole.	238, 239
Wemys <i>against</i> Linzee.	324-328
Weston <i>against</i> Downes.	23-25
Wheate (Paget <i>against</i>)	669-671
Wheatman (the King <i>against</i>)	345, 346
Whitaker (Boyce <i>against</i>)	94-97
Vol. I.	Whitbread

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Whitbread (the King <i>against</i>)	549 to 555
Whitcomb <i>against</i> Whiting.	652—654
White (Jeffery <i>against</i>)	476, 477
— (Lee <i>against</i>)	256
— (Powell <i>against</i>)	169
— <i>against</i> Sealy.	49, 50
Whitehead (Taylor <i>against</i>)	745—759
Wiglesworth <i>against</i> Dallison.	201—207
Wilkes (Wyllie <i>against</i>)	519—524
Wilkins <i>against</i> Carmichael.	101—105
— (Wilkins <i>against</i>)	18—21
Wilkinson (Bailly <i>against</i>)	671
Willan (Read <i>against</i>)	422—426
Williams Frith <i>against</i>)	198
— (Jones <i>against</i>)	214, 215
Williamson (Coghlan <i>against</i>)	93
Willis <i>against</i> Baldwin.	450, 451
Willson (Janfon <i>against</i>)	257—260
Wilson (Ayres <i>against</i>)	385, 386
— (Lavabre <i>against</i>)	284—291
Wiltshire <i>against</i> Lloyd.	381, 382
Winchcomb (the King <i>against</i> the Inhabitants of)	391—393
Winckles (Goodtitle, lessee of) <i>against</i> Bil- lington.	753—758
Witter (Walker <i>against</i>)	1—7
Wivelingham (the King <i>against</i> the Inhabitants of)	767—770
Woodbridge (Bermion <i>against</i>)	781—790
Wooldridge <i>against</i> Boydell.	16—18
Woolley <i>against</i> Cloutman.	244—246
Wortley <i>against</i> Rayner.	637
Wright (Bradbury <i>against</i>)	624—628
— (Bristow <i>against</i>)	665—669
Wyburd (Wase <i>against</i>)	246—247
Wyllie <i>against</i> Wilkes.	519—524

Y

Yates <i>against</i> Freckleton.	623, 624
Yorkshire (the King <i>against</i> the Justices of)	192, 193

Z

Zinck <i>against</i> Langton.	749—753
-------------------------------	---------

INDEX

I N D E X

OF

CASES CITED, &c.

N. B. The letter o. means *Original*, and denotes, that the case is not to be found in any former book of reports; the letter n. by itself, or followed by a *numerical character*, as n. [1], [2], &c. indicates, that the case referred to is mentioned in one of the notes marked with *numerical characters*; n. followed by another letter, thus, n. (a), n. (b), &c. that it is one of those marked with *letters*; and the mark †, that it is also one of those which were added in the second edition.

A.

ABDY's Case, 538
 Abingdon, *the King v. the Mayor of*, 83, 154, 155
 Absor v. French, 746
 Acherley v. Vernon, 38, 716, 717, n.
 Acton v. Eels, 61
 Adamson, Heylin v. 635
 Alderson v. Temple, 259, 296
 Allen v. Peshal, 253, n. (a)
 Alston, Fen v. 430
 Altham (*Lord*) v. *the Earl of Anglesea*, 26
 Amps (*or Aunts*), Robinson v. 27
 Andrews v. Fulham, 66, & n. 493
 ———, Blandford v. 693, 694

Anglesea, *Lord Altham v. the Earl of*, 26
 Anthon v. Fisher, o. 649, n. †, 506, n.
 Antrim, *the Duke of Buckingham v. Lord*, 568
 Archer v. Bothenham, 126
 ———, Maye v. 377, n.
 Argyle v. Hunt, 379, 380, n.
 Arlington (*Lord*) v. Merricke, 214
 Arton v. Hare, 66
 Arundel, Berry v. 663
 Ash v. Walker, o. 95
 Ashby v. White, 351
 Assievido v. Cambridge, 617, n.
 Astel, Mills v. 214

- Afle v. Grant, C. B. o. 724, n. to 727, n.
 —, Grant v. B. R. T. 22 Geo. 3. o. 731, n. to 732, n.
 Atley (*Sir John*) the case of his leases, o. 572
 — v. Reynolds, 698, n.
 — v. Young, 678
 Astlin v. Perkins, o. 485
 Attorney General (*the*) v. Brereton, 143, 144
 — v. Gill, 267, n.
 — v. Senior, 415, 416, & n.
 Atwood, Vincent v. 60
 Auger v. Wilkins, 378, n.
 Aunts (*or Amps*), Robinson v. 27
 Austen v. the Executors of Sir William Dodwell, 688, 693
 Austin v. Jervoise, 692, 693, 694
 — v. Taylor, o. 343
 Avelyn v. Ward, 66, 493, 505, n.
 Avery v. Hoole, o. 683, & n. [1] & † 143
 Aynsworth, Turvil v. 194, n.
 B.
 Bachurst v. Clinkard, 651, n.
 Bagg's Case, 80, 154
 Bagot v. Oughton, 569, 573, 574
 — v. —, 569, & n. (d)
 Bagshaw v. Spencer, 340, n. [2], 341
 Baker's Case, 130
 —, Sanderson v. 42
 Balch, Doe Lessee of, v. Putt and others, o. 773, & n. [1], 775, & n. [2], 778, 779
 Baldwin, Karver v. o. 494, 499, 502, 503, & n. [1], 504, n. & † 107
 Ball v. Partridge, 549
 Baltinglass, Tristram, v. Lady, 569, 571
 Bamfield, Zouch v. 45
 Bampton, Bower v. 247, n. [1], 741, 742, 743, 744
 Banks, Pattison v. o. 165, & n. [12], 166, & 54
 Barbeck, Tilburgh v. 267, n. [1]
 Barefoot, Hopwood v. 626, 628
 Barjeau v. Walmesley, 743
 Barkley, Jones v. o. M. 22 Geo. 3. 695, n. [3] to 698, n.
 Barnard, Dor, Lessee of, v. Reason, 267, 757
 Barnard, the King v. 536
 Barnardiston, Carter v. 499, n. 505, n.
 —, Watkinson v. 103
 Barnes, Harris v. 494, 496, 499, 502
 Barnevelt, Pawson v. o. 12, n. (4)
 Barnstaple, Basset v. the Mayor of, 84
 Barrington, Serle v. Lord, 37
 Barrow, Macarty v. 55, † 28, 164, 166, † 55
 Bartlet, Linton v. 87, 91, † 296
 Basset v. the Mayor of Barnstaple, 84
 Bathurst, Fletcher v. 100
 Baxter v. Burfield, 70
 Bayley v. Grant, 102, 540
 Baynham v. Matthews, 429, & n. [1], 430
 Bearcroft, Ex parte, o. 200, n.
 Beckwith's Case, 26, 44
 —, Ibbetson v. 434
 Beech v. Paxton, 68, & n. [6], 69
 —, the King v. 194, & n. [25], & †
 Beecher's Case, 190
 Bejushin, Colthirst v. 755
 Belchier v. Collins, o. 22
 Bell v. Burrows, 405, n. (m)
 —, Stratham v. o. 66, & n. [4]
 Bellamy, Bodily v. 753, n.
 Bellasis v. Burbreck, 457, 461
 — v. Hester, 464
 Belton, Ex parte, 521
 Bennet, Silk v. 382
 Bennington v. Taylor, 203
 Berrington v. Parkhurst, 484, n. (a)
 Bernet, Tomkins v. 696, n. 697, n.
 Berry v. Arundel, 663
 Bertie v. Falkland, 36
 — White, Lessee of Perry, v. o. 53, n. [16]
 Berthon, Kenyon v. 12, n. [4]
 Bettenham, Ricord v. 643, 644, 646, 647, 648
 Beviston v. Hufsey, 762
 Billers v. Bowles, 316, n. [2]
 —, Lake v. 42, & n. (m)
 Bingley's Case, 604
 Birch v. Wood, 143, 144
 Bird v. Randal, 110
 —, Mallory v. 235, 236
 Birbeak, Pullen v. 475
 Bishop's Hatfield, the King v. the Inhabitants of, 391
 Black v. Peele, o. 248, 249
 Blackett, Saville v. 293
 Blackwell v. Nash, 686

INDEX OF CASES CITED, &c.

xxxvii

- Blake, Perrin v. 342, & n. (i), (k), (l), (m), 343, & n. [3]
 Bland v. Hafelrig, 652, 653, n. [1]
 —, Robinson v. 743
 Blandford v. Andrews, 693, 694
 Blantern, Collins v. 96, & n. [11]
 Blencoe, *Crusoe Lessee of*, v. Bugby, 57, 183, 184, 185
 Bliffel, *the King v. o.* 398, & n. [22]
 Blundwell v. Loverdell, 453
 Bodily v. Bellamy, 753, n.
 Body v. Tassel, 236
 Boehm, Carter v. 753
 Bogg v. Rose, 71, n. (w)
 Bois v. Bois, 377, n. [11]
 Bolney, Shermandbury v. 10, n.
 Bolton, Roe, *Lessee of Callow & others*, v. 760, 761, 762, n. [1], 763
 Bond v. Gonzalez, 368, n.
 — v. Nutt, o. 358, 364, 365, 367, n. to 370, n. 785, & n. [1], 786, 790
 — v. Seawell, 37
 Bones v. Booth, 706, n. [4]
 Booreman's *Case*, 354, 355, & n. (v)
 Booth v. Lord Warrington, 656
 —, Bones v. 706, n. [4]
 Boraston's *Case*, 755
 Bosanquet v. Daffwood, 698, n.
 Bostock, *the Earl of Pembroke v.* 753, n.
 Bosworth v. Philips, 72, n. [7]
 Bothenham, Archer v. 126
 Bott v. Brabalon, 143
 Boulogne v. Vautrin, o. 467, n. & † 104
 Bowles v. Bradshaw, 4, n. [1]
 —, Billers v. 316, n. [2]
 —, Coan v. 709, n. [2], 752, n. [3]
 Bowton v. Nicholls, 752, n. [3]
 Bowyre v. Bampton, 247, n. [1], 741, 742, 743, 744
 Boyall, *the King v.* 156
 Brabalon, Bott v. 143
 Brace, Leigh v. 323
 —, Penoyer v. 637, n. [1]
 Bradshaw, Bowles v. 4, n. [1]
 — v. Fairholme, 170, n. [13]
 —, Le Fevre v. 368, n. [4]
 —, Richardson v. 179, & n. [6]
 Bramshaw, *the King v. the Inhabitants of*, 564
 Brampton v. Crab, 245, n. [2]
 Brandon, Wangford v. 9, n. [2], 10, n.
 Brathwaite's *Case*, 159
 Bree, *Roe Lessee of*, v. Lees, 206
 Brereton, *the Attorney General v.* 143, 144
 Brett v. Rigden, 339, n. (c), 340, n. (s)
 Brewer, Rakestraw v. 354
 Brewster v. Kitchen, 625, 628
 Brian v. Thorn, o. 59, 60
 Brice v. Cartel, 766
 Bridgeford, *the King v. the Inhabitants of*, 70, 71
 Bridges v. Raymond, 678, n. [3]
 Bridgewater, *the Case of the Countess of*, 322
 Bright v. Purrier, 55, & n. [a]
 Brightwell, Carleton v. 203
 Bristow, Hanna v. o. 39, 60
 Broadbent, Wilkes v. 205
 Bromley, Smith v. o. 696, n. to 698, n.
 Brooke v. Warde, 31
 Broom, *the King v.* 695
 Broome v. Hoare, 184, n. [21]
 Brown v. Franklyn, 603, 612, 618, n.
 — v. Fullbye, 236
 — v. Heathcote, 104
 — v. Thompson, 35, 37, 39
 —, Pells v. 495, n. (c), 756, & n. 757, 758, n. [2]
 —, Richards v. T. 18 Geo. 3. o. 739, & n. (c), & † 159, † 160
 Browne, *Doe Lessee of*, v. Holme & Longmire, 263, 266, 505, n. 758
 Brownsword v. Edwards, 496, 509
 Bruce's *Case*, 151, 154, 155, 156, 159
 — v. Rawlins, 316, n. [1]
 Buckingham, *the Duke of*, v. Lord Antrim, 568
 Buckland, *Denham, the King v. the Inhabitants of*, 335
 Buckley v. Rice Thomas, 475, n. [1]
 Bugby, *Crusoe, Lessee of Blencoe*, v. 57, 183, 184, 185
 Bullock, Coke v. 34
 Bunker v. Cooke, 36
 Buxter v. Coke, 714

Burbreck,

- Burbreck, Bellasis v. 457, 461
 Burden, Doe, *Lessee of*, v. Burville, o. 52, n. [16]
 Burdus, Peyton v. 71.
 Burdwick, Oland v. 205
 Burfield, Baxter v. 70
 Burnham, Ford v. 228, n. (a)
 Burrows, Bell v. 403, n. (m)
 Burtenshaw v. Gilbert, o. 36, 40
 Burton v. Thompson, 255
 Burville, Doe, *Lessee of Burden*, v. o. 53, n. [16]
 Burwash, Suddleeomb v. 663, 664, n. [1]
 Bury, *the King v. o.* 194, & n. [26]
 Butler v. Swinnerton, 45, n. [1]
 Buxenden v. Sharp, 684, & n. (a)
- C.
- Cadogan, Wright v. Lord, o. 53, n. [16], & † 23
 Callow, Roe, *Lessee of*, v. Bolton, 760, 761, 762, n. [1], 763
 Cambridge, Ashvedo v. 617, n.
 ———, *the King v. the Corporation of*, 400, 401
 ———, *the King v. the Vice Chancellor, &c. of*, 535, n. [1]
 Cameron v. Lightfoot, 674, 675
 Campbell v. Hall, o. 4, & †
 Canning (*Elizabeth's*) *Cafe*, 763
 Carleton v. Brightwell, 205
 ———, *Lessee of Griffin*, v. Griffin, 38
 ———, Doe v. 494, 496
 Carlisle, *the King v. the Parish Officers of*, 331, 332
 Carpenter, Pitts v. 245, n. [2], 448, 449
 Carr, Hill v. 27, 766, & n. [1]
 ———, Hollis v. 776, & n. [1]
 Carre, Brice v. 766
 Carruthers, Sparrow v. 276
 Carshalton, *the King v. the Inhabitants of*, 226, & †, 227 †, 543
 Carter v. Barnardiston, 499, n. 505, n.
 ——— v. Boehm, 733
 ——— v. *the Royal Exchange Assurance Company*, 17, 355, & n. (d)
 ——— v. Mutcot, 444
 ———, Goodright, *Lessee of*, v. Strathan, o. 53, n. [17], 54, † 27
 Carver. *Vide* Karver.
 Carwardine, Trumper v. o. 202, 206
- Castlechurch, *the King v. the Inhabitants of*, 392
 Cadwall, *Ex parte*, 45
 Caswell, *Ex parte*, 165, & n. [10]
 Catlin v. Milner, 330
 Cator, Hare v. E. 18 Geo. 3. o. 183, & † 58, 184, & n. [21], 186, 484, & n. [1]
 Champernon v. Champernon, o. 625
 Chapman v. Flexman, 218, n. [11], 221
 ———, Forth, v. 449, 503
 ———, Walker, v. o. 471
 Charnock v. Worsley, 45
 Chase, Lewis v. 696, n.
 Cheddington, *the Case of the Rector of*, 52
 Cheshyre v. Dunball, 444
 Chester, *the King v. the City of*, 84
 Chesterfield, *the Earl of*, v. Janlen, 740
 Chichester, *the King v. the Mayor of*, 136, & n. (b), 137
 Child, Edwards v. 277
 ———, Walmsley v. 635
 Cholmley's *Cafe*, 755
 Christopher v. Christopher, 35, 37, 38, 39
 Chudleigh's *Cafe*, 755, 776, n.
 Clapham, *the King v.* 154
 ———, *the King v. the Inhabitants of*, 71
 Clark v. Glas, 431
 ——— v. Shee, o. 698, n. (b), & † 147
 Clarke, Taylor v. 199
 Clay v. Sudgrave, 102, & n. [1]
 Clayton v. Simmonds, 291
 Cleg, *the King v.* 633, n. [1]
 Clegg's *Cafe*, 180, & n. (o)
 Clerke, Lynch v. 594, n.
 Clifton v. Jackson, 491
 ———, Dickson v. 677, n. [1]
 Clinkard, Bachurst v. 651, n.
 Clough, Stubbs v. 214
 Coan v. Bowles, 724, n. 709, n. [2], 752, n. [3]
 Cock v. Ratcliff, 96
 Cockeril, Symonds, v. 739
 Coffin, Short v. 115, n. [1]
 Coke v. Bullock, 34
 ———, Bunter v. 714
 ———, Lenthal v. 96, 97, n. [12]
 Cole v. Rawlinson, 36, 762, 764
 ———, Reed v. 386, n. [17]
- Colley,

Colley, *Hickman v.* 245, n. [2]
 Collins v. Blantern, 96, & n. [11]
 —, *Belchier v.* o. 22
 Collyer, *Fox v.* 573
 Colthirst v. Bejushin, 755
 Combe v. Pitt, 16, & n. (s)
 Commyn v. Kineto, 305, & n. (b)
 Comyns, *Morrough v.* 647, n. [1]
 Conebie v. Rusky, 716
 Coney, *Sucklinge v.* 693
 Cook v. Cook, 323, 432
 — v. Harris, 457, 458
 Cooke v. Sayer, 678, n. [2]
 —, *Bunker v.* 36
 Cookson, *Lessee of Rous, v. Rous, o.*
 433
 Coombe v. Westwoodhay, 440
 Cooper, *Rust v. o.* 87, & † 38, 88,
 296
 Cormick, *Mather v. o.* 59, 60
 Cornish, *Goodright v.* 493, 496
 Coryton v. Lithebye, 218, n. [11],
 221, & n. [12]
 Coulson v. Coulson, 337 in *Marg.* 340,
 341, 342, 343, 344 † 90, 345
 Coultsbourn, *South Cerney v.* 440
 Cozen's *Cafe*, 498
 Crab, *Brampton v.* 245, n. [2]
 Cranmer's *Cafe*, 491, 492, n. [1], 497
 Cranvell v. Saunders, 34
 Crawford v. Powell, 83
 — v. Whittal, o. 4. & n. [1],
 to 5, n.
 Cremer v. Dent, 108
 Croasdale, *Gardiner v.* 732, n. & n.
 (k)
 Cromwell's *Cafe*, 45
 —, *Taverner v.* 729
 Crosby, *Lord Mayor of London, the*
Cafe of, 156
 Crosscombe, *the King v. the Inhabitants*
of, 309, 400
 Crusoe, *Lessee of Blencoe, v. Bugby*,
 57, 183, 184, 185
 Cudlip v. Rundle, 668
 Cumberland's *Cafe*, 570, 571, 574
 Cutler, *Snow v.* 491, 497, 501

D.

Dacres, *the Cafe of Lord*, 221, 212
 Daintry, *Penniz v.* 295, n. (b)
 Dalton (*or Hobart*) v. Hammond,
 725, n. 729, & n. (c)
 Daniel v. Ubley, 45
 Darnal, *the King v.* 663

Dashwood, *Bosanquet v.* 698, n.
 Dauling, *Maffa v.* 739
 Davies v. Norton, 77, 78, & n. [8],
 505, n.
 —, *Haywood v.* 96, n. 429, n.
 [1]
 —, *Sir John Ratcliff v.* 644
 Davis v. Leving, 256
 Davy, *Doe, Lessee of Pate, v. o.* 716,
 & n. [2], & † 151
 Day v. Savage, 126
 —, *Houghton v.* 214
 —, *Wilson v.* 91 †, 296
 Deerly v. *the Ducheſs of Mazarine*,
 253, n. (a)
 Deeze, *Ex parte*, 103
 Demattos, *Kaye v.* 217, n. [1]
 —, *Swaine v.* 165, & n. [9],
 [12]
 —, *Worsley v.* 87, 88, 91 †,
 296
 Den, *Lessee of Earl Standope, v. Skeggs*,
 o. 184, n. [20]
 —, *Lessee of Gaskin, v. Gaskin, o.*
 760, 763, 764
 Dent, *Cremer v.* 108
 Derby, *the King v. the Mayor of*, 80,
 n. (d)
 De Roven, *Duplein v.* 4. n. [1]
 Deslaux v. Hood, 63, n. [2]
 Devallar, *the Executors of, v. Herring*,
 635
 Devenish v. Mertins, 308
 Deyton's *Cafe*, 154
 Dickson v. Clifton, 677, n. [1]
 Dike and *Dunſon's Cafe*, 749
 Dive v. Manningham, 97, n. [12]
 Dixon v. Plant o. 199, n. [1]
 Dodderidge, *Startup v.* 204, 205
 Dodwell, *Auſten v. the Executors of*
Sir William, 688, 693
 Doe, *Lessee of Burden, v. Burville, o.*
 53, n. [16]
 — v. Carleton, 494, 496
 —, *Lessee of Pate, v. Davy, o.* 716,
 & n. [2], and † 151
 —, *Lessee of Browne, v. Holme &*
Longmire, 265, 503, n. 758
 —, *Lessee of Bach, v. Pate, o.* 773,
 & n. [1], 775, & n. [2], 778, 779
 —, *Lessee of Barnard, v. Reason*,
 267, 757
 —, *Lessee of Watſon, v. Routledge*,
 o. 716, n. [1], & † 152
 — v. Snowden, 207, n. [7]

Doe,

- Doe, *lessee of Odiarne*, v. Whitehead, 45
 Doncaster, *the King* v. *the Mayor of*, 155
 Dormer v. Fortescue, 484
 Dowler, Higgins v. 505, n.
 Dunball, *Cheshyre* v. 444
 Duncomb, *the South Sea Company*, v. 644
 Duncombe v. Duncombe, 343
 Duplein v. De Roven, 4, n. [1]
 Dutch *West India Company*, Henriques v. *the*, 215
 Dutton v. Poole, 144, 146
 E.
 Eades, Woodford v. 510, n. [2]
 Earle, *Sir Thomas's Case*, 80, & n. (c)
 East India Company, Edwin v. *the*, 277, & n. [1]
 Ebizson, Holroi v. 752, n. [3]
 Eden, Radcliffe v. o. 701, & † 148, 705, 706
 Edge, Scattergood v. 493
 Edwards v. Child, 277
 — v. *the Countess of Warwick*, 776, n.
 —, Brownford v. 496, 509
 —, Flower v. 740
 Edwin v. *the East India Company*, 277, & n. [1]
 Eels, Aston v. 61
 Eggesfield, Ridlay v. 604, 612
 Elkin v. Wastell, 728
 —, Pinbury v. 499
 Ellesfield, *the King* v. *the Inhabitants of*, o. 310, & n. [1]
 Ellis, Wall, 316, n. [1]
 — v. Warner, 742, 744
 Errington, Pearuddock v. 752, n. [3]
 Etherington, Tierney v. 368, n. (1)
 Ewer, Pawson v. o. 11, n. [3], 12, n. [4], 13, 261, 262
 Ex parte Bearcroft, 200, n.
 —, Belton, 521
 —, Caswall, 45
 —, Caswell, 165, & n. [10]
 —, Deeze, 103
 —, Greenway, 165
 —, Groome, 165
 —, Le Compte, 521
 —, Michell, 165, 166, † 55
 —, Shanks, 103
 —, Winchester, 124
 Exeter, *the City of*, v. Glyde, 155, 157
 Exeter, *the Mayor of*, v. Trimlet, 729, 730
 Eyre v. Eyre, 35
 F.
 Fairholme, Bradshaw, v. 170, n. [13]
 Falkland, Bertie, v. 36
 —, Lytton, v. *Lady*, 36
 Fall, Inglis v. o. 646, & n. (d)
 Fandrye, Miller v. 747
 Farmer, Green v. 103
 Fawkener and another, *Executors of Middleton*, Swayse v. 762
 Fen v. Alston, 430
 Fergusson, Thellusson v. o. E. 17 Geo. 3. 364, 366, 367, n. 369, n. 370, n. & n.
 Fishhead Magdalen, *the King* v. *the Inhabitants of*, 310, & n. [1]
 Filewood v. Popplewell, 60
 Fisher, Anthon v. o. 649, n. [1], 650, n.
 Fletcher v. Bathurst, 100
 —, Tyrie v. o. 587, 588, 784, & † 168, 785, 790
 Flexman, Chapman v. 218, n. [11], 221
 Floyer v. Edwards, 740
 Foden v. Haines, 95, & n. [10]
 Fogossa, Reniger v. 130
 Ford v. Burnham, 228, n. (a)
 Forse v. Hembling, 35
 Forsyth, Stone v. T. 22 Geo. 3. o. 709, n. [2]
 Fortescue, Dormer v. 484
 Forth v. Chapman, 499, 503
 Foster v. Wilmer, 17, 165, & n. (d)
 Fowler, *the King* v. 415, 416, & n. [2]
 Fox v. Collyer, 573
 —, Lanesborough v. 492, 500, 502
 Francis's Case, 212
 — v. Mott, o. 634
 Franklyn, Brown v. 605, 612, 618, n.
 Frazer, Sinclair v. o. 2, 5, n. 6
 Freeman v. Gwyn, 263, n. [1]
 —, Parsons v. 719
 Freemantle, Raincock v. o. 101, & † 42
 French, Abfor v. 746
 Frenche's Case, 716
 Fulham, Andrews v. 66, & n. 493
 Fullarton, Watts v. o. 718, 719
 Fuller v. Fuller, 339, n. (c), 340, n. (c), 345, n.
 Fulsbye,

- Fulbye, Brown v. 236
- Gardiner v. Croasdale, 132, n. & n. (k)
- Gardner v. Jessop, 381
- Garnet, Shuttleworth v. 728, n. [3], 729, & n. [3]
- Gascoyne (*Sir Crisp*) the Case of, o. 656
- Gaskin, *Dem. Lessee of*, v. Gaskin, 760, 763, 764
- Gateward's Case, 126
- Gaunt, Target v. 499
- Gantris, Norris v. *the Hundred of*, 465
- Gell, Rowlls v. o. 304, & n. [1] & †
- Germain, Lepara v. 136
- Gerrard, Pollard v. 629
- Gibson, *the King* v. o. 377
- Gilbert, Burtenshaw v. o. 36, 46
- Gill, *the Attorney General* v. 267, n.
- Gimbert, Shaw v. 68, & † 33, 69
- Glascock, Shires v. 242, 243, 244
- , Took v. 329
- Glasf, Clark v. 431
- Glazier, *Goodright Lessee of*, v. Glazier, 40
- Glyde, *the City of Exeter* v. 155, 157
- Goddard v. Vanderhyden, 165, n. [12]
- Gonsales, Bond v. 368, n.
- Goodman v. Goodright, 490, 497, 500, 502, 507, & n. [3]
- Goodright v. Cornish, 493, 496
- , *Lessee of Wynne*, v. Humphrys, o. 52, & n. [14]
- , *Lessee of Glazier*, v. Glazier, 40
- , *Lessee of Carter*, v. Strathan, o. 53, n. [17], 54 † 27
- v. Wright, 339, & n. [1]
- , Goodman v. 490, 497, 500, 502, 507, & n. [3]
- Goodwin v. Goodwin, 433
- v. West, 558, n. [1], 559, 560, n. [4]
- , Turner v. 688, 689, & n. [2]
- Gordon v. Morley, 74 † 36, 368, n. 734
- Gore v. Gore, 496
- Goring, Hickman v. o. 308
- Goss v. Withers, 232, 233, & n. (v), 617, n.
- Grant, Affle v. B. R. T. 22 Geo. 3. o. 331, n. to 732, n.
- v. —, C. B. o. 724, n. to 727, n.
- v. Vaughan, 634
- Bayley v. 102, 440
- Grantham v. Hawley, 204, & n. [3]
- Gravefend, *the King v. the Inhabitants of*, 664
- Green v. Farmer, 103
- , Newcombe v. 377
- , Rann v. o. 10, n. & † 5, 502, & † 98, 406
- Greene, Harbin v. 221
- Greenway, *Ex parte*, 165
- Griffin, *Carlton, Lessee of*, v. Griffin, 38
- Griffiths, Roe v. 717
- Groome, *Ex parte*, 165
- Grunwell and Winship, *the King* v. 333, n. [1]
- Gulliver v. Wicket, 65, 499, n. [2]
- Gwin, Olive v. 4
- Gwyn, Freeman v. 263, n. [1]
- H.
- Hackney, Saint Giles's Cripplegate v. 664
- Hague v. Rolleston, 296
- Haines, Foden v. 95, & n. [10]
- Hall, Campbell v. o. 4, & †
- Haman v. Truap, 429
- Hamilton v. Mendez, 14, 232, 233
- Hammond, Hobart (*or Dalton*) v. 725, n. 729, & n. (c)
- , Right v. 492
- Hanbecke, *the Case of Martin Van*, 236
- Hanger, *the King and Waller* v. 121
- Hann, *the King* v. 589, & n. (a)
- Hanna v. Bristow, o. 59, 60
- Harbin v. Greene, 221
- Hardinge, Murray v. 740
- , Widlake v. 322
- Hare v. Cator, B. R. E. 18 Geo. 3. o. 183, & † 58, 184, & n. [21], 186, 484, & n. [1]
- , Arton v. 66
- Harris v. Barnes, 494, 496, 499, 502
- v. Oke, 651, & n. [1]
- , Cook v. 457, 458
- Harrison v. Sharp, 205
- Hartop v. Holt, 351, 352
- Harvey, Havithbury v. 559
- Haselrig, Bland v. 652, 653, n. [1]
- Haslard,

- Haffard, *Ross v. o.* 598, 602, 603,
 & n. [1] 608, 611
 Hastings, *Heylin v.* 652
 Havithbury v. Harvey, 559
 Hawkins, White, *Lessee of Whatley, v.*
 23, n. [7], & †, 281, n. (d)
 Hawley, *Grantham v.* 204, & n. [3]
 Hayward, *Page v.* 65, 765, n.
 Haywood v. Davies, 96, n. 429, n. [3]
 Haxhay *Stallingburgh v.* 663, 664
 Hearing, *Webb v.* 266, 268, n. [1]
 Heathcote, *Brown v.* 104
 Heaton, *Little v.* 485
 Heley v. Rigs, 115, n. [1], & n. (d)
 Hembling, *Forse v.* 35
 Hemings v. Robinson, 652
 Hemlington, *the King v. the Inhabitants*
of, o. 9, n. [2]
 Hemming, *Long v.* 281
 Henn's *Cafe*, 746, 747
 Henriques v. *the Dutch West India*
Company, 114
 Hensloe's *Cafe*, 545
 Hereford's *Cafe*, 80, n. (d), 82
 ———, *the King v. the Mayor of,*
 179, 181
 Herring, *the Executors of Devallar v.*
 635
 Hester, *Bellasis v.* 464
 Heydon v. Heydon, 739, 651, n. [1]
 Heylin v. Adamson, 635
 ——— v. Hastings, 652
 Hickman v. Colley, 245, n.
 ——— v. Goring, o. 308
 Higgins v. Dowler, 505, n. [2]
 Hill v. Carr, 27, 766, & n. [1]
 ———, *the King v.* 83
 Hincksworth, *the King v. the Inhabit-*
ants of, o. 46, & n. [13]
 Hitch v. Wallis, o. 729
 Hitchin v. Stevens, 681
 Hoare, *Broome v.* 184, n. [21]
 Hobart (or Dalton) v. Hammond,
 725, n. 729, & n. (c)
 ———, *Lord Stamford v.* 475
 Hoddesdon *Jackman v.* 725, n. 726, n.
 Hodges v. Steward, 635
 Hodgkinson v. Wood, 501, & n. (a)
 Holdip v. Otway, 316, & n. (a)
 Holland v. Jackson, 45
 Hollis v. Carre, 766, & n. [1]
 Holme and Longmire, Doe, *Lessee of*
Browne v. 265, 505, n. 758
 Holmes, *Poultney v.* 183, 184, 188 †
 Holroi v. Ebizson, 752, n. [3]
 Holt, *Hartop v.* 351, 352
 Hood, *Deslaux v.* 63, n. [2]
 Hooke v. Moreton, 540
 Hooile, *Avery v. o.* 613, & n. [1],
 & † 143
 Hopkin, *Matthews v.* 768, n.
 Hopkins v. Hopkins, 340, & n. (g),
 492, 494, n. [1], 496, & n. (b),
 509
 Hopwood v. Barefoot, 626, 628
 Hornsey, *Shute v. o.* 668
 Horton, *Wilmot v. o.* 700, 701, 702,
 & n. [3], 705, 706, 707, n. (a)
 Houghton v. Day, 214
 Hubbard & Key v. Pearle, o. 606 to
 608, & n. [1], 619, n.
 Huish v. Phillips, 429
 Humphrys, *Goodright, Lessee of Wynne,*
v. o. 52, & n. [14]
 Hunt v. Singleton, 567
 ———, *Argyle v.* 379, 380, n.
 ———, *the King v. o.* 683, n. [1]
 Husband, *Pollen v.* 35
 Hufsey v. Jacob, 742, & n. [1], 743,
 744
 ———, *Beviston v.* 766
 ———, *Sanders v.* 329
 Hutchinson, *Mayor of Carlisle, the*
King v. 153
 Hutton v. Simpson, 339, 340, n. (c)

I.

- Jackman v. Hoddesdon, 725, n. 726, n.
 Jackson, *Middleton v.* 726, n. & n.
 (a)
 ———, *Clifton v.* 473, 677, n. [1]
 ———, *Holland v.* 45
 Jacob, *Hufsey v.* 742, & n. [1], 743,
 744
 James, *the King v.* 751, n. [2]
 Jansen, *the Earl of Chesterfield v.* 740
 Jarvis, *the King v. Maurice*, 346
 Ibbetson v. Beckwith, 434
 Jeffery (or Jefferys) v. Legender (or
Legendra), 74, n. [7]
 Jefferys & Swan, *the King v.* 340,
 n. (b), n. (f)
 Jennings, *Nottingham v.* 267, n. [1]
 Jennison, *the King v. o.* 390
 Jenkin v. Pritchard, 483, n. [1]
 Jeoffereys, *Mountague v.* 34
 Jervoise, *Austin v.* 692, 693, 694
 Jessop, *Gardner v.* 381
 Ingleton, *the King v. the Inhabitants of,*
 770, n. [1]

Inglis v. Fall, o. 646, & n. (a)
 Johnson v. Lee, 629, n. [1]
 — v. Smith, 62, † 30, 112, n.
 [13]
 Jolliffe, Lowe v. 140
 Jones v. Barkley, o. M. 22 Geo. 3.
 695, n. [3], to 698, n.
 Jones v. Westcomb, 65, 79
 —, Lloyd v. o. 213, n. [10]

K.

Karver, Baldwin v. o. 494, 499, 502,
 503, & n. [1], 504, n. & † 107
 Kaye v. De Mattos, 217, n. [1]
 Kempland, Perkins v. 100, 397, n.
 [21] 522, 524
 Kenyon v. Berthorn, o. 12, n. [4]
 Key & Hubbard v. Pearse, o. 606 to
 608, & n. [1], 619, n.
 Killet, *the King* v. 487, n. [1]
 Killingsworth, Lancashire v. 686, 693
 Kime, Luddington v. 265, 266, 499,
 n. [2], 505, n. 754, 757, 758
 Kineto, Commyn v. 305, & n. (b)
 Kinfare v. Kingswinford, 564
 King v. Melling, 433, 496
 King (*the*) v. *the Mayor* of Abingdon,
 83, 154, 155
 — v. Barnard, 536
 — v. Beech, o. 194, & n.
 [25], & †
 — v. *the Inhabitants* of Bishop's
 Hatfield, 391
 — v. Bliffel, o. 398, & n. [22]
 — v. Boyal, 156
 — v. *the Inhabitants* of Bram-
 shaw, 564
 — v. *the Inhabitants* of Bridge-
 ford 70, 71
 — v. Broom, 605
 — v. *the Inhabitants* of Buck-
 land Denham, 335
 — v. Bury, 19, & n. [1]
 — v. *the Corporation* of Cam-
 bridge, 400, 401
 — v. *the Vice Chancellor*, &c.
 of Cambridge, 535, n. [1]
 — v. *the Parish Officers* of Car-
 lisle, 331, 332
 — v. *the Inhabitants* of Carlhal-
 ton, 226, 564
 — v. *the Inhabitants* of Castle-
 church, 392
 — v. *the City* of Chester, 84

King (*the*) v. *the Mayor* of Chichester,
 136, & n. (b), 137
 — v. Clapham, 154
 — v. *the Inhabitants* of Clap-
 ham, 71
 — v. Cleg, 631, n. [1]
 — v. *the Inhabitants* of Cross-
 combe, 309, 400
 — v. Darnall, 633
 — v. *the Mayor* of Derby, 80,
 n. (d)
 — v. *the Mayor* of Doncaster,
 155
 — v. *the Inhabitants* of Ellef-
 field, o. 310, & n. [1]
 — v. *the Inhabitants* of Fife-
 head Magdalen, 310 & n. [1]
 — v. Fowler, 415, 416, & n.
 [1]
 — v. Gibson, 377
 — v. *the Inhabitants* of Grave-
 send, 664
 — v. Grunwell & Winslip,
 333, n. [1]
 — & Waller v. Hanger, 122
 — v. Hann, 589, n. (a)
 — v. *the Inhabitants* of Hem-
 lington, o. 9, n. [1]
 — v. *the Mayor* of Hereford,
 179, 181
 — v. Hill, 83
 — v. *the Inhabitants* of Hinkf-
 worth, o. 46, & n. [13]
 — v. Hunt o. 683, n. [1]
 — v. Hutchinson, *Mayor* of
 Carlisle, 153
 — v. James, 751, n. [2]
 — v. Maurice Jarvis, 346
 — v. Jefferys & Swan, 240,
 n. (b), n. (f)
 — v. Jennison, o. 390
 — v. *the Inhabitants* of Ingle-
 ton, 770, n. [1]
 — v. Killet, 469, n. 487, n.
 [1]
 — v. *the Dukes* of Kingston,
 4, n. (b), -5, n. (b)
 — v. *the Inhabitants* of King's
 Norton, 335
 — v. Lambert, 82, 83
 — v. *the Inhabitants* of, Lam-
 beth, 405
 — v. *the Mayor* of Liverpool, 155
 — v. *the Inhabitants* of Lowels,
 657, 658, & n. [1], & † 135
 King

- King (the)* v. Loxdale, 349, n. [2]
 — v. the Mayor of Lynne, 82, 85, 154
 — v. the Inhabitants of Macclesfield, 335
 — v. Mann, 112, n. [11]
 — v. the Inhabitants of Marwood, 770, n. [1]
 — v. Mellenger, 210, 211, 212
 — v. the Justices of Middlesex, 349
 — v. the Inhabitants of Minchinhampton, 663
 — v. Moore, 240, n. (2)
 — v. Morely, 549, n. [1]
 — v. the Inhabitants of Natland, 631, 632, 770
 — v. the Inhabitants of Navestock, 440, 441
 — v. the Mayor of Newcastle, 157
 — v. the Inhabitants of Newstead, 440, 441
 — v. the Inhabitants of Newton, 440
 — v. Nudigate, 666
 — v. the Inhabitants of Painf-wick, 631
 — v. Sir Henry Penrice, 82
 — v. Percival, 191, n. [23]
 — v. Perkalle, 662, 663, 664
 — v. Plymouth, o. 243
 — v. Poland, 308
 — v. the Inhabitants of Preston near Feversham, 660
 — v. Purnell, 240
 — v. Rebow, 118, & n. [2]
 — v. Richardson, 80, & n. (d), 153, 154, 155, 157, 159, 180
 — v. the Inhabitants of Ringwood, 563
 — v. William Rogers, 81, n. [9]
 — v. the Churchwardens of Rotherhithe, 117, n. (k)
 — v. Royce, 210
 — v. the Inhabitants of Saint Agnes, 335
 — v. the Inhabitants of Saint Giles's in the Fields, 10, n.
 — v. the Inhabitants of Sarrat, 564
 — v. the Inhabitants of Saxmundham, 10, n.
- King (the)* v. Sewel, 743
 — v. the Inhabitants of Sowerby, 418
 — v. the Inhabitants of Spotland, 419
 — v. Stevens, 179
 — v. Swan & Jefferys, 240, n. (b), n. (f)
 — v. the Inhabitants of Syder-ton, o. 441, n. [1]
 — v. the Churchwardens of Taunton Saint James's, o. 83, & † 37
 — v. the Inhabitants of Taun-ton Saint Mary Magdalen, 418, 419
 — v. the Inhabitants of Tavil-tock, 71
 — v. Theed, 487, n. [1], 550, n. (a), 552
 — v. Tiddlerley, 84
 — v. Tindall, 550, n. (a), 552
 — v. the Inhabitants of Under Barrow, H. 6 Geo. 3. 310, & n. [1]
 — v. Vandewall, 304, n. [1]
 — v. Vaws, 536
 — v. the Inhabitants of Walfall, o. 564, & n. [1]
 — v. Wangford, 10, n.
 — v. the Inhabitants of War-blington, 622
 — v. Philip Carteret Webb, 239
 — v. the Corporation of Wells, 157
 — v. the Inhabitants of Wester-leigh, 392, 393
 — v. the Inhabitants of West-well, 440
 — v. the Inhabitants of West-wood, 662, 663
 — v. Whitehead, 180
 — v. the Inhabitants of Wid-worthy, 631
 — v. Williams, 583, n. (a)
 — v. Winship & Grunwell, 533, n. [1]
 — v. the Inhabitants of Witney, 563
 — v. the Inhabitants of Wood-sterton, 333, n. [2]
 King's Norton, the King v. the Inhabitants of, 335
 Kingston v. Preston, o. 689 to 691, 695

INDEX OF CASES CITED, &c.

24

- Kingston, *the King v. the Duke of*,
 4, n. (b), 5, n. (b)
 Kingwinford, *Kinfare v.* 564
 Kirton, *Symson v.* 34
 Kitchen, *Brewster v.* 625, 628
 Knapton, *Scott v.* 352
 Knight, *Savage v.* 62

 L
 Lake v. Billers, 42, & n. (m)
 — v. Lake, 40
 Lambert's *Cafe*, 82, 83
 —, *the King v.* 82, 83
 —, *the King v. the Inhabitants of*,
 405
 Lancashire v. Killingworth, 686, 693
 Lancaster, *Popham v.* 726, n. & n.
 (b)
 Lanthborough v. Fox, 492, 500, 502
 Langfield, *Rogers v.* 40
 Lanford, *Rogers v.* 776, n.
 Langton, *Zinck v. o. B. R. T.* 22
Geo. 3. 751, n. [2], to 753, n.
 Lansdowne, *Penphrae v. Lord*, 36
 Law v. Skinner, 92 †, 93 †, 297, n.
 [1]
 Leake, *Workman v. o.* 671, & †
 139
 Le Compte *Ex parte* 521
 Ledger, *Sands & Tesh v.* 666
 Lee, *Johnson v.* 629, n. [1]
 Leeds, *Pugh v. the Duke of*, o. 53, n.
 [15], 185, n. [23]
 Lees, *Roe, Lessee of Bree v.* 206
 Le Fevre v. Bradshaw, 368, n. (b)
 Legender (*or Legendra*) v. Jeffery (*or*
Jefferys) 74, n. [7]
 Leigh v. Brace, 323
 —, *Stanley v.* 494, n. (a), 505, n.
 Lekeux v. Nash, 462, n.
 Le Mayne v. Stanley, 242, n. (b)
 Lenthall v. Coke, 96, 97, n. [12]
 Lepara v. Germain, 136
 Lethieulliet, *Tracy v.* 78
 Leving, *Davis v.* 256
 Lewin, *Sorrel v.* 682
 Lewis v. Chafe, 696, n.
 —, *Moore v.* 728
 —, *Taffel & Lea v.* 635
 —, *Vaughan v.* 157
 Lightfoot, *Cameron v.* 674, 675
 Lincoln, *the Earl of, v. Rolfe*, 35,
 715, 719, 722
 Lindo v. Rodney, o. 613, n. [1], to
 620, n.
 Linn *Regis*, *Taylor v. the Mayor of*,
 126, 127
 Linton v. Bartlet, 87, 91, †, 296
 Lithebye, *Coryton v.* 218, n. [1],
 221, & n. [12]
 Little v. Heaton, 485
 —, *Powell v.* 624, n. [1]
 Liverpool, *the King v. the Mayor of*,
 155
 Livingston v. Mackenzie, o. 599,
 603
 Lloyd v. Jones 213, n. [10]
 — v. Skutt, o. Ni. Pr. after M. 20
Geo. 3. 63, n. [2]
 — v. Williams, 235, 237, 740
 —, *Parsons v.* 674
 Loftus, *Whitley v.* 519, n. [2]
 London Assurance Company, *Motteux*
v. the, 368, n.
 —, *the Bishop of, v. the Mercers'*
Company, 753, n.
 Long v. Hemming, 281
 Loverdell, *Blundwell v.* 453
 Loveday, *Winter v.* 570, 574
 Lowe v. Joliffe, 140
 Lowells, *the King v. the Inhabitants of*,
 657, 658, & n. [1], & † 135
 Loxdale, *the King v.* 349, n. [2]
 Luddington v. Kime, 265, 266, 499,
 n. [2], 505, n. 754, 757, 758
 Lugg v. Lugg, 36, 39
 Lynch v. Clerke, 594, n.
 Lynne, *the King v. the Mayor of*, 82,
 85, 194
 Lytton v. Lady Falkland, 36

 M
 Maberly v. Serjeant, o. 700, 701
 Macarty v. Barrow, 55 † 28, 164,
 166 † 55
 Macclesfield, *the King v. the Inhabit-*
ants of, 335
 Mackenzie, *Livingston v. o.* 599,
 603
 Maddison (*Madison or Modifon*) v.
 Shore, 558, n. [2], 559, & n. (c)
 Mallory v. Bird, 235, 236
 Manchester Mills, *the Case of*, 222, &
 n. [13]
 Mandeville, *the Case of John de*, 501,
 506, n.
 Maningham, *Dive v.* 97, n. [12]
 Mann, *the King v.* 112, n. [13]
 Manning v. Napp, 545
 Mansfield, *Phippard v.* 53, n. [16]
 Markham

- Markham v. Middleton, 509, & n. [1], 510, n. [2]
 Martin v. Tregonwell, 776, n.
 Marwood, *the King v. the Inhabitants of*, 770, n. [1]
 Massa v. Dauling, 739
 Mather v. Cormick, o. 59, 60
 Mathews v. Hopkins, 678, n.
 ———, Baynham v. 429, & n. [1], 430
 Maye v. Archer, 377
 Mazarine, Deerly v. *the Duchess of*, 253, n. (a)
 Meggot v. Mills, 295, n. (b)
 Mellish, King v. 433, 496
 Mellor v. Spateman, 151
 Mendez, Hamilton v. 14, 232, 233
 Mercer, Traupaud v. 95
 Mercers' Company, *the Bishop of London v. the*, 753, n.
 Merricke, Lord Arlington v. 214
 Mertins, Devenish v. 308
 Messenger, *the King v.* 210, 211, 212
 Middlesex, *the King v. the Justices of*, 349
 Middleton v. Jackson, 726, n. & n. (a)
 ———, Markham v. 509, & n. [1], 510, n. [2]
 ———, Wayne v. 594, n.
 Miller v. Fandrye, 747
 ———, Morris v. 172, 174
 ——— v. Race, 634, 635, 636
 Mills v. Astell, 214
 ———, Meggot v. 295, n. (b)
 Milner, Catlin v. 330
 Minchinhampton, *the King v. the Inhabitants of*, 663
 Mitchell, *Ex parte*, 165, 166 + 55
 ——— v. Rodney, o. 620, n. & + 126
 Mitford, Pybus v. 490, 492
 Molyneux v. Molineux, 38
 Moore v. Lewis, 728
 ——— v. Parker, 491, 497, 501
 ———, *the King v.* 240, n. (c)
 ———, Stafford v. 61
 Moreley, *the King v.* 349, n. [1]
 Moreton, Hook v. 540
 Morgan v. Scudamore, 726, n. & n. (c)
 Morely, Gordon v. 74 + 36, 368, n. 734
 Morris v. Miller, 172, 174
 ——— v. Pugh, 62 + 36, 112, n. [13]
 Morrough v. Comyns, 647, n. [†]
 Mott, Francis v. o. 634
 Motteux v. *the London Assurance Company*, 368, n.
 Mountague v. Jeoffereys, 34
 Mountjoy's Case, 568, 571
 Muilman, Woolmer v. 733, & n. [1]
 Murcot, Carter v. 444
 Murray, Hardinge v. 740
 N.
 Nap, Manning v. 545
 Napper v. Sander, 78
 Nash, Blackwell v. 686
 ———, Lekeux v. 462, n.
 ———, Read v. 572, 573
 Natland, *the King v. the Inhabitants of*, 631, 632, 770
 Navestock, *the King v. the Inhabitants of*, 440, 441
 Naylor, *qui tam*, v. Scott, 205, & n. [4]
 Neale, Price v. 635, 640
 Nedham, Lord Stamford v. 474, 475
 Nele (or Smith) Turner & Cary v. 599, 601, 604, & n. (a)
 Nevinston, Stevenson v. 83
 Newcastle, *the King v. the Mayor of*, 157
 Newcombe v. Green, 377
 Newstead, *the King v. the Inhabitants of*, 440, 444
 Newton, *the King v. the Inhabitants of*, 440
 Nicholls, Bowton v. 752, n. [3]
 Norris v. *the Hundred of Gautris*, 469
 ——— v. Waldron, 678, n. [3]
 North, Potter v. 126, 303
 Norton, Davies v. 77, 78, & n. [8], 505, n.
 Nottingham v. Jennings, 267, n. [1]
 Nudigate, *the King v.* 666
 Nutt, Bond v. o. 358, 364, 365, 367, n. to 370, n. 785, & n. [1], 786, 790
 O.
 Odiarne, Doe, *Lessee of*, v. Whitehead, 45
 Offley, Puller v. o. 512
 Oke, Harris v. 651, & n. [1]
 Oland v. Burdwick, 205
 Olive v. Gwin, 4
 Opie, Peter v. 687, 693
 Otway v. Ramsay, 4
 ———, Holdipp v. 316, & n. (a)
 Oughton,

- Oughton, Bagot v. 569, 573, 574
 — v. 569, n. (d)
 Oxford, Rush v. *the Chancellor and Scholars of*, 537
- P.
- Page v. Hayward, 65, 756, n.
 — Smith v. 253, n. (a)
 Painwick, *the King v. the Inhabitants of*, 631
 Parker v. Thacker, 267, n. [1]
 —, Moore v. 491, 497, 501
 Parkhurst, Berington v. 484, n. (a)
 Parris's *Cafe*, 351, 352
 Parslowe v. Weedon, 714
 Parsons v. Freeman, 719
 — v. Lloyd, 674
 Partridge, Ball v. 549
 Pate, *Doe, Lessee of*, v. Davy, o. 716, & n. [2]. & † 151
 Pattison v. Baake, o. 165, & n. [12], 166, & † 54
 Pawson v. Barnevelt, o. 12, n. [4]
 — v. Ewer, o. 11, n. [3], 12, n. [4], 13, 261, 262
 — v. Snell, o. 11, n. [3], 261, 262
 — v. Watson, o. 11, n. [3], 261, 262
 Paxton, Beech v. 68, & n. [6], 69
 Pay's *Cafe*, 494, n. [1]
 Pearse, Key & Hubbard v. o. 606 to 608 & n. [1], 619, n. 6
 Peart v. Westgarth, 349, 350
 Peele, Black v. o. 248, 249
 Pells v. Brown, 495, n. (c), 756, & n. 757, 758, n. [2]
 Pelly v. *the Royal Exchange Assurance Company*, 368, n.
 Pembroke, *the Earl of*, v. Bostock, 753, n.
 Penoyer v. Brace, 637, n. [1]
 Penphraze v. Lord Lansdowne, 36
 Penrice, *the King v. Sir Henry*, 82
 Penriz v. Daintry, 295, n. (b)
 Penruddock v. Errington, 752, n. [3]
 Pepperharrow v. Trensham, 440
 Percival, *the King v.* 191, n. [23]
 —, Salmon v. 674
 Perkasse, *the King v.* 662, 663, 664
 Perkins v. Kempland, 100, 397, n. [21], 502, 524
 —, Aftin v. o. 485
 —, Titus v. 732, n.
- Perrin v. Blake, 342, & n. (i), (d), (l), (m), 343, & n. [3]
 Perry, *White, Lessee of*, v. Bertie, o. 53, n. [16]
 Peshall, Allan v. 253, n. (a)
 Peter v. Opie, 687, 693
 Peyton v. Burdus, 71
 Phillips v. Smith, 115
 —, Bosworth v. 72, n. [7]
 —, Huish v. 429
 Phippard v. Mansfield, o. 53, n. [16]
 Pibus v. Mitford, 490, 492
 Pickin, Rann v. o. 308 † 82, 406, n. [1]
 Pilkington v. Shaller, 186, 460, & n. [1], 462, n.
 Pillans v. Van Mierop, 299
 Pinbury v. Elkin, 499
 Pitt, Combe v. 16, & n. (s)
 Pitts v. Carpenter, 245, n. [2], 448, 449
 Plaistow v. Van Uxem, o. 5, n.
 Plant, Dixon v. 199, n. [1]
 Plymouth, *the King v.* o. 243
 Poland, *the King v.* 308
 Pollard v. Gerrard, 629
 — v. Scoly, 235, 236
 Pollen v. Husband, 35
 Pomfret v. Microft, 748
 Poole, Dutton v. 144, 146
 Pope, Skinner v. 185, 669 † 138
 Popham v. Lancaster, 726, & n. (b)
 Poplewell, Filewood v. 60
 Portington, *the Cafe of Mary*, 45
 Potter v. North, 126, 303
 Poultney v. Holmes, 183, 184, 188 †
 Powel v. Little, 624, n. [1]
 Powell, Crawford v. 83
 Power v. Wells, o. 24, & n. [8], & † 13
 Prate, Price v. 143
 Preston near *Feverham, the King v. the Inhabitants of*, 660
 —, Kingston v. o. 689 to 691
 —, Whitton v. 351, 352
 Price v. Langford, 776, n.
 — v. Neale, 635, 640
 — v. Pratt, 143
 Prichard, Jenkin v. 483, n. [1]
 Pridgeon's (or Wood's) *Cafe*, 633
 Prouse's *Cafe*, 538
 Pugh v. *the Duke of Leeds*, o. 53, n. [15], 185, n. [22]
 —, Morris v. 62 † 30, 112, n. [13]
 Pullen v. Birkbeak, 475

- Paller v. Offley, o. 512
 Pakeney, Walpole v. o. 248, 249, & n. [2], 250
 Purefoy v. Rogers, 265, n. (a)
 Purnell *the King* v. 240
 Purrier, Bright v. 55, & n. (a)
 Putt and others, Doe, *Lessee of Balch*, v. o. 773, & n. [2], 775, & n. [2], 778, 779
- Q
- Queen (*the*) v. Townshend, 550, n. (a)
 — v. Truebody, 157
 — v. Twitty, 82
- R
- Race, Miller v. 634, 635, 636
 Radcliffe v. Eden, o. 701, & † 148, 705, 706
 Radclyffe, Roper v. 770
 Rae, Scott and others, v. v. 787, & n. [1], 790
 Raincock v. Freemanle, o. 101, & † 42
 Rakestraw v. Brewer, 345
 Raley, Robinson v. 60, 96, n. 429, n. [1], 430
 Ramsey, Otway v. 4
 Randall, Bird v. 110
 Rana v. Green, o. 10, n. & † 5, 402, & † 98, 406
 — v. Pickin, o. 308, † 82, 406, n. [1]
 Ratcliff, Sir John, v. Davies, 944
 Ratcliffe, Cock v. 96
 Rawlins, Bruce v. 316, n. [1]
 Rawlinson, Cole v. 36, 762, 764
 Raymond, Bridges v. 678, n. [3]
 Read v. Nash, 572, 573
 Reason, Doe, *Lessee of Barnard*, v. 267, 757
 Rebow, *the King* v. 118, & n. [2]
 Redstone, Rutier v. 352, n. [3]
 Reed v. Cole, 386, n. [17]
 Reeves, Walker v. o. 461, n. [1], to 463, n.
 Regina. *Vide the Queen*.
 Reniger v. Fogossa, 130
 Rex. *Vide the King*.
 Reynolds, Astley v. 698, n.
 Rice Thomas, Buckley v. 475, n. [1]
 Richards v. Brown, o. T. 18 Geo. 3. 739, & n. (c), & † 159, † 160
 Richardson v. Bradshaw, 170, & n. (b)
- Richardson v. Yardley, 432, & n. (d)
 —, *the King* v. 80, & n. (d)
 153, 154, 155, 157, 159, 180
 —, Sedgwick v. 115
 —, *The Smelting Company* v. 304, n. [1]
 Ricord v. Beutenham, 643, 644, 646, 647, 648
 Ricroft, Pomfret v. 748
 Ridley v. Eggesfield, 604, 612
 Rigden, Brett v. 339, n. (f), 340, n. (e)
 Right v. Hammond, 492
 —, *Lessee of Shaw*, v. Russell, o. 761, 764
 Rigs, Heley v. 115, n. [1], & n. (d)
 Ringwood, *the King* v. *the Inhabitants of*, 563
 Robinson v. Amps (*or Aunt*), 27
 — v. Bland, 743
 — v. Raley, 60, 96, n. 429, n. [1], 430
 —, Hemings v. 652
 —, Wilson v. 434
 Rodney, Lindo v. o. 613, n. [1], to 620, n.
 —, Mitchell v. o. 620, n. & † 126
 Roe, *Lessee of Callow and others*, v. Bolton, 760, 761, 762, n. [1], 763
 — v. Griffiths, 717
 —, *Lessee of Bras*, v. Lees, 206
 Rogers v. Langfield, o. 40
 — v. Rogers, 17
 —, *the King* v. William, 81, n. [9]
 —, Purefoy v. 265, n. (a)
 —, Sandford v. 431
 Ralls, *the Earl of Lincoln* v. 35, 715, 719, 722
 Rolleston, Hague v. 296
 Roper v. Radclyffe, 770
 Rose, Bogg v. 71, n. (m)
 Rotherhithe, *the King* v. *the Churchwardens of*, 117, n. (h)
 Roubell, Thomson v. o. 467, n.
 Rous v. Hassard, o. 598, 602, 603, & n. [1], 611
 Rous, Cookson, *Lessee of*, v. Rous, o. 533
 Routledge, Doe, *Lessee of Watson*, v. 716, n. [1], & † 152
 Rowls v. Gell, 304, & n. [1], & †
 Royal Exchange Assurance Company, Carter v. *the*, 17, 265, & n. (d)
 —, Pelly v. *the*, 268, n. Royce

Royce, *the King v.* 210
 Rundle, Cudlip *v.* 668
 Rush *v. the Chancellor, &c. of Oxford*,
 537
 Rusby, Conesby *v.* 716
 Russell, Strode *v.* 36
 —, *Right, Lessee of Shaw, v. o.*
 761, 764
 —, *Wright v.* 214
 Rust *v. Cooper, o.* 87, & † 38, 88,
 296
 Rutter *v. Redstone*, 352, n. [3]

S.

Saint Agnes, *the King v. the Inhabitants*
of, 335
 —, *Giles's Cripplegate v. Hackney*,
 664
 —, *Giles's in the Fields, the King v. the*
Inhabitants of, 10, n.
 Salmon *v. Percival*, 674
 Sanders *v. Hufsey*, 329
 —, *Cranvell v.* 34
 —, *Napper v.* 78
 Sandford *v. Rogers*, 431
 Sands and Tals *v. Ledger*, 666
 Sandwich, *the Case of Lord*, 437
 Barratt, *the King v. the Inhabitants of*,
 564
 Gaunderfon *v. Baker*, 42
 Savage (*Maurice's*) *Case*, 355, & n.
 [1], 356, & n. [4]
 — *v. Knight*, 62
 —, *qui tam v. Smith*, 42, n. (m),
 666, 668, & n. [1]
 —, *Day v.* 126
 Saville *v. Blacket*, 293
 Saxmundham, *the King v. the Inhabit-*
ants of, 10, n.
 Say & Seal (*Lord*) *v. Stephens*, 352
 Sayer, Cooke *v.* 637, n. [2]
 —, *White v.* 204
 Scattergood *v. Edge*, 493
 Scollastica's *Case*, 222, n. [14], 493
 Scoly, Pollard *v.* 235, 236
 Scott *v. Knapton*, 352
 —, *and others v. Rae, o.* 787, & n.
 [1], 790
 —, *Naylor, qui tam, v.* 205, & n.
 [4]
 Cudamore, Morgan *v.* 726, & n.
 (c)
 Sawell, Bond *v.* 37
 Sedgwick *v. Richardson*, 115
 Selwin *v. Selwin*, 717
 Vol. I.

Senior, *the Attorney General v.* 415,
 416, & n.
 Sergeaunt, Maberly *v. o.* 700, 701
 Serle *v. Lord Barrington*, 37
 Sewel, *the King v.* 743
 Shaller, Pilkington *v.* 186, 460, & n.
 [1], 462, n.
 Shanks, *Ex parte*, 103
 Sharp, Buxendin *v.* 684, & n. (a)
 —, *Harrison v.* 205
 Shaw *v. Gimbert*, 68 & † 33, 69
 —, *Right, Lessee of, v. Russel, o.*
 761, 764
 Shee, Clark *v. o.* 689, n. (b), &
 † 147
 Shelley's *Case*, 489, 497, 501, 506,
 n.
 Shepherd *v. Shepherd, o.* 37, & n.
 [10]
 Shermandbury *v. Bolney*, 10, n.
 Snires *v. Glascock*, 242, 243, 244
 Shore, Maddison (*Maddiften or Meddi-*
son) *v.* 558, n. [2], 559, & n. (c)
 Short *v. Coffin*, 115, n. [1]
 Shute *v. Hornsey, o.* 668
 Shuttleworth *v. Garnet*, 728, n. [3],
 729, & n. [3]
 Silk *v. Bennet*, 382
 Simmonds, Clayton *v.* 291
 Simpson, Hutton *v.* 339, 340, n. (e)
 Sinclair *v. Fraser, o.* 4, 5, n. 6
 Singleton, Hunt *v.* 567
 Skeggs, Den, *Lessee of Earl Stanhope*,
v. o. 184, n. [20]
 Skinner, Law *v.* 92 †, 93 †, 297, n.
 [1]
 —, *Pope v.* 185, 669, † 138
 Skutt, Lloyd *v. o. N. Pr. after M.*
 20 Geo. 3. 63, n. [2]
 Skykker, Pope *v.* 185
 Slade's *Case*, 6, 21
 Slater's *Case*, 633
 Smelting Company, (*the*) *v. Richard-*
son, 304, n. [1]
 Smith *v. Bromley, o.* 696, n. to 698,
 n.
 — *v. Page*, 253, n. (a)
 —, *Johnson v.* 62, † 30, 112, n.
 [13]
 —, *Phillips v.* 115
 —, *Savage, qui tam, v.* 42, n. (m),
 666, 668, & n. [1]
 —, *Sparkes v.* 186, 460, 462, n.
 —, (*or Nele*) *Turner and Cary v.*
 599, 601, 604, & n. (a)
 Snell,

- Snell, Pawson v. o. 11, n. [3], 261, 262
 Snow, Stevenson v. 368, n. 587, 588, 785, 786, 787, 796
 Snowden v. Thomas, 316, n. [2]
 ———, Doe v. 207, n. [7]
 Snowe v. Cutler, 491, 497, 501
 Somner, Uppom v. 415
 Sorrel v. Lewin, 682
 South Cerney v. Coultbourn, 440
 ——— Sea Company (the) v. Duncomb, 644
 ——— v. Wymondsell, 656
 Southcot v. Stawell, 501
 Sowerby, the King v. the Inhabitants of, 418
 Sparkes v. Smith, 186, 460, 462, n. ——— v. Spicer, 253, n. (a)
 Sparks, Tully v. 116, n. 163, 164, & n. [8], 155, n. [10], 352, n. [3]
 Sparrow v. Carruthers, 276
 Spateman, Mellor v. 131
 Speke's Case, 33
 Spencer, Bagshaw v. 340, n. [2], 341
 Spicer, Sparkes v. 253, n. (a)
 Spotland, the King v. the Inhabitants of, 419
 Spragge v. Stone, o. 35, 37, 38, 39
 Stafford v. Moore, 61
 Stallinburgh v. Haxhay, 663, 664
 Stamford (Lord) v. Hobart, 475
 ——— v. Nedham, 474, 475
 Stanhope, Den, Lessee of Earl, v. Skeggs, o. 184, n. [20]
 Stanley v. Leigh, 494, n. (a), 505, n. ———, Le Mayne v. 242, n.
 Staples, Thellusson v. o. 366, n. [9]
 Startup v. Dodderidge, 204, 205
 Statham v. Bell, o. 66, & n. [4]
 Stawell, Southcot v. 501
 Stedman's Case, 794
 Stephens v. Stephens, 496, n. (b), 502, 506, n. 508
 ———, Lord Say and Seal v. 352
 Stevens, Hitchin v. 681
 ———, The King v. 179
 Stevenson v. Nevinston 83
 ——— v. Snow, 368, 587, 588, 785, 786, 787, 790
 Steward, Hodges v. 635
 Stibbs v. Clough, 214
 Stone v. Forsyth, o. T. 22 Geo. 3. 709, n. [2]
 ———, Spragge v. o. 35, 37, 38, 39
 Strathan, Goodright, Lessee of Carter, v. o. 53, n. [17], 54 + 27
 Strode v. Russell, 36
 Sucklinge v. Coney, 693
 Suddlecomb v. Burwash, 663, 664, n. [1]
 Sudgrave, Clay v. 102, & n. [1]
 Swaine v. Demattos, 165, & n. [9], [12]
 Swan and Jefferys, the King v. 240, n. (b), n. (f)
 Swayne v. Fawkenor and another, Executors of Middleton, 762
 Swinnerton, Butler v. 45, n. [1]
 Syderton, the King v. the Inhabitants of, o. 441, n. [1]
 Symonds v. Cockeril, 739
 Symson v. Kirton, 34
 T.
 Target v. Gaunt, 499
 Tassell and Lee v. Lewis, 635
 Tassel, Body v. 236
 Taunton St. James's, the King v. the Churchwardens of, o. 83, & + 37
 ——— St. Mary Magdalen, the King v. the Inhabitants of, 418, 419
 Taverner v. Cromwell, 729
 Tavistock, the King v. the Inhabitants of, 71
 Tawney's Case, 117, 118
 Taylor v. the Mayor of Lynn Regis, 126, 127
 ———, Austin v. o. 343
 ———, Bennington v. 203
 ———, Clarke v. 199
 Temple, Alderson v. 256, 259
 Thacker, Parker v. 267, n. [1]
 Theed, the King v. 487, n. [1], 550, n. (a), 552
 Thellusson v. Fergusson, E. 17 G. 3. 364, 366, 367, n. 369, n. 370, n. & *
 ——— v. Staples, o. 366, n. [9]
 Thelwell, Waddington v. 263
 Thomas's Case, 794
 ———, Snowden v. 316, n. [2]
 ———, Williams v. o. 751, n. [2]
 Thompson, Brown v. 35, 37, 39
 ———, Burton v. 255
 ———, Vandewoodst v. o. 609, 611
 Thomson v. Roubell, 467, n.
 Thorn, Brian v. 59, 60
 Thornboroug, Willingham v. 470, 471
 Tickner

Tickner v. Tickner, 35
 Tidderley, *the King* v. 84
 Tierney v. Etherington, 368, n. (1)
 Tilburgh v. Barbeck, 267, n. [1]
 Tindall, *the King* v. 550, n. (a), 552
 Titus v. Perkins, 732, n.
 Tomkins v. Bernet, 696, n. 697, n.
 Took v. Glascock, 329
 Townshend's *Cafe*, 355
 Townshend, *the Queen* v. 550, n. (a)
 Tracy v. Lethieullier, 78
 Traupaud v. Mercer, 95
 Tregonwell, Martin v. 776, n.
 Trensham, Pepperharrow v. 440
 Trevor v. Trevor, 501
 Trimlet, *the Mayor of Exeter* v. 729, 730
 Tristram v. Lady Balinglafs, 569, 571
 Truant, Haman v. 429
 Truebody, *the Queen* v. 157
 Trumper v. Carwardine, o. 202, 206
 Tully v. Sparks, 116, n. 163, 164, & n. [8], 165, n. [10], 352, n. [3]
 Turner v. Goodwin, 688, 689, & n. [2]
 — & Gary v. Nele (or Smith), 599, 601, 604, & n. (a)
 Turvil v. Aynsworth, 194, n.
 Twitty, *the Queen* v. 82
 Twyne's *Cafe*, 88, 296
 Tyrie v. Fletcher, o. 587, 588, 784, & † 168, 785, 790
 Tyte v. Willis, 267, n. [1]

U.

Ubly, Daniel v. 45
 Under Barrow, *the King* v. *the Inhabitants of*, H. 6 Geo. 3. 310, & n. [1]
 Uppom v. Somner, 415
 Uvedall v. Uvedall, 493

V.

Vanderheyden, Goddard v. 165, n. [12]
 Vanderwoodst v. Thompson, o. 609, 611
 Vandewall, *the King* v. 304, n. [1]
 Van Mierop, Pillans v. 299
 Van Uxem, Plaistow v. o. 5, n.
 Vaughan v. Lewis, 157
 —, Grant v. 634
 Vautrin, Boulogne v. o. 467, n. & † 104
 Vaws, *the King* v. 336
 Vernon, Acherley v. 38, 716, 717, n.
 Vigilant (*Le*) *the Cafe of*, o. 600
 Vincent v. Atwood, 60

W.

Waddington v. Thelwell, 263
 Wakeman, Walker v. 570, 571, 574
 Waldron, Norris v. 678, n. [3]
 Walker v. Chapman, o. 471
 —, Reeves v. o. 461, n. [1], to 463, n.
 — v. Wakeman, 570, 571, 574
 —, Ash v. o. 95
 Wall, Ellis v. 316, n. [1]
 Waller, *the King and*, v. Hanger, 121
 Wallis, Hitch v. o. 729
 Walmesley, Child v. 635
 —, Barjeau v. 743
 Walpole v. Pulteney, o. 248, 249, & n. [2], 250
 Walfall, *the King* v. *the Inhabitants of*, o. 564, & n. [1]
 Waltham Magna v. Waltham Parva, 663
 Wangford v. Brandon, 9, n. [2], 10, n.
 Warblington, *the King* v. *the Inhabitants of*, 622
 Ward's *Cafe*, 360, & n. [7]
 —, Avelyn v. 66, 493, 505, n.
 Warde, Brooke v. 31
 Warner v. White, *Lessee of White*, o. 344, n. [4]
 Warnes, Ellis v. 742, 744
 Warrington, Booth v. Lord, 656
 Warwick, *qui tam*, v. White, 550, n. (a), 552
 —, Edwards v. *the Countess of*, 776, n.
 Wastell, Elkin v. 728
 Watkinson v. Barnardiston, 103
 Watson, Doe, *Lessee of*, v. Routledge, 716, n. [1], & † 152
 —, Pawson v. o. 11, n. [3], 261, 262
 Watts v. Fullarton, o. 718, 719
 Webb, *the King* v. Philip Carteret, 210
 — v. Hearing, 266, 268, n. [1]
 Weedon, Parslowe v. 714
 Wellington v. Wellington, 35
 Wells, *the King* v. *the Corporation of*, 157
 —, Power v. o. 24, & n. [8], & † 13
 West, Goodwin v. 558, n. [1], 559, 560, n. [4]
 Westby's *Cafe*, 352, n. [3]
 Westcombe, Jones v. 65, 79

- Westerleigh, *the King v. the Inhabitants of*, 392, 393
 Westgarth, *Peat v.* 349, 350
 Westminster, *the Case of the Dean and Chapter of*, 568
 Westwell, *the King v. the Inhabitants of*, 440
 Westwood, *the King v. the Inhabitants of*, 662, 663
 Westwoodhay, *Combe v.* 440
 Whatley, White, *Lessee of*, Hawkins *v.* 23, n. [7] & †, 281, n. (d)
 White, *Lessee of Whatley, v. Hawkins*, 23, n. [7], & †, 281, n. (d)
 — *v. Sayer*, 204
 —, *Ashby v.* 351
 —, *Lessee of Bertie, v. Perry, o.* 53, n. [16]
 —, *Lessee of White, Warner v. o.* 344 n. [4]
 —, *Warwick, qui tam, v.* 350, n. [2], 552
 Whitehead, Doe, *Lessee of Odiarne, v.* 45
 —, *the King v.* 180
 Whitley *v. Loftus*, 519, n. [2]
 Whittall, Crawford *v. o.* 3, 4, & n. 5, n.
 Whitton *v. Preston*, 351, 352
 Wicket, Gulliver *v.* 65, 499, n. [2]
 Wickham, *the Corporation of, v. the Mayor*, 305, & n. (c)
 Widlake *v. Hardinge*, 322
 Widworthy, *the King v. the Inhabitants of*, 631
 Wild's Case, 322, 323, 424, & n. (d), 433
 Wilkes *v. Broadbent*, 205
 Wilkins, Auger *v.* 378, n.
 Williams *v. Thomas, o.* 751, n. [2]
 —, *the King v.* 583, n. (a)
 —, *Lloyd v.* 235, 237, 740
 Willingham *v. Thornborough*, 470, 471
 Willis, Tyte *v.* 267, n. [1]
 Willowe's Case, 726, n.
 Wilmer, Foster *v.* 17, 365, & n. (d)
 Wilmot *v. Horton, o.* 700, 701, 702, & n. [3], 705, 706, 707, n. (a)
 Wilson *v. Day*, 91 †, 296
 —, *Robinson v.* 434
 Winchester, *Ex parte*, 524
 Winship, (*Grunwell and*), *the King v.* 333, n. [1]
 Winter *v. Loveday*, 570, 574, & n. (v)
 Withers, Gofs *v.* 232, 233, 617, n.
 Withipole, *the Case of Sir William*, 248, n. (b), n. (f)
 Witney, *the King v. the Inhabitants of*, 563
 Wood's (*or Pridgeon's*) Case, 633
 Wood, Birch *v.* 143, 144
 Wood, Hodgkinson *v.* 501, & n. (a)
 Woodford *v. Eades*, 510, n. [2]
 Woodsterton, *the King v. the Inhabitants of*, 333, n. [2]
 Woolmer *v. Mullman*, 733, & n. [1]
 Workman *v. Leake, o.* 671, & † 139
 Worsley *v. Dematos*, 87, 88, 91 †, 296
 —, *Charnock v.* 45
 Wright *v. Lord Cadogan, o.* 53, n. [16], & † 23
 — *v. Russell*, 214
 — *v. Wyvill*, 491
 —, *Goodright v.* 339, & n. [1]
 Wymondsell, *the South Sea Company v.* 656
 Wynne, *Goodright, Lessee of, v. Humphrys, o.* 52, & n. [14]
 — *v. Middleton*, 594, n.
 Wyvill, Wright *v.* 492

Y.

 Yardley, Richardson *v.* 432, & n. (d)
 Young, Astley *v.* 678
 — *v.* 747, n. (c)

Z.

 Zinck *v. Langton, o. B. R. T. i. Geo. 3.* 751, n. [2], to 753, n.
 Zouch *v. Bamfield*, 45

INDEX

OF

CASES CITED, &c.

In the Additional Notes to the Second Edition.

A.

ABBOT, *the King v. o.* 553
+ 113.
Abrahams v. Bunn, 247 + 70
Alexander v. the Justices of Berk-
shire, o. 554 +
Allan, Long v. o. 790 + 169
Allanson, Cockerell v. o. 781 + 167
Allin, Goodright v. 764 + 164
Anthon, Fisher v. 650 + 132
Appleton v. Sweetapple, 515 +
110
Aylett v. Lowe, 6 + 4

B.

Backwell v. Hunt, 42 + 17
Bailie v. Wilson, 141 +, Addend.
Baillie v. Modigliani, o. 235 + 68
Barber, Best v. o. 101 + 42, 192
+ 60.
Barzillay v. Lewes, o. 583 + 117
Beckley v. Newland, 40 +, Ad-
dend.

Beckwith, Ibbetson v. 764 + 164
Bedford, Compton v. 91 +
Beerling, Reynolds v. o. 112 + 47
Berkshire, Alexander v. the Justices
of, o. 554 +
Best v. Barber, o. 101 + 42, 192
+ 60
Beston, Browning v. 58 +
Beckley v. Newland, 40 +, Ad-
dend.
Bishop, Walth v. 169 + 56
Blackerby, Broadwaite v. 313 +
84
Blackett, Roe v. 764 + 164
Bright, Loveacres v. 764 + 164
Bolland v. Pritchard. 466 + 103
Bonner, Foster v. 62 + 30
Boone v. Eyre, 691 + 145
Bordell, Campbell v. 74 + 36
Brangwin v. Perrot, 50 + 20
Braithwaite, Southcote v. o. 218 +
64, Addend.
Broadwaite v. Blackerby, 313 + 84
Brograve, the King v. 563 + 115
Brown, Findal v. 515 + 110
Browning v. Beston, 58 +
— **v. Morris**, 698 + 146
Buchan,

INDEX OF CASES CITED, &c.

- Buchan, Cochran v. *the Earl of*, 6
+ 2
Bucknell, Weakley, *Lessee of Yea*,
v. 22 + 8
Bunn, Abrahams v. 247 + 70
Bush v. Leake, o. 431 + 109
Burgess v. Wheate, 526 + 111
Butler, Jacky v. 651 + 133
Butterfield v. Heath, o. 721 + 154
Devonshire, *the Duke of*, v. Crad-
dock, 727 + 155
Doe, *Lessee of Hanson*, v. Fyldes,
268 + 76
Dundass v. *Lord Weymouth*, 667
+ 136
Dunster v. Pierce, 684 + 144
Durrant v. Lawrence, o. 228 + 66
—— v. Surecold, o. 228 + 66

C.

- Cadell, Mace v. 167 +, 320 + 87
Campbell v. Bordell, 74 + 36
Carlisle, Trears v. 669 + 138
Carne, Slater v. o. 431 + 100
Carvick v. Vickery, o. 653 + 134
Catchpole, Ledwick v. o. 360 + 93
Chilton v. Whiffin, 166 + 55
Church, Jenkins, *Lessee of Yate*, v.
54 + 26
Cochran v. *the Earl of Buchan*, 6
+ 2
Cockerell v. Allanson, o. 781 +
167
Coe, Rich v. 105 + 44
Coke, Fountain v. 141 + 51, Ad-
dend.
College of Physicians (*the*), *the King*
v. 355 + 92
Compton v. Bedford, 91 +
Cooper, Renalls v. o. 108 + 45
Cowper, Stiles v. 54 + 26
Cox v. Liotard, 166 + 55
Craddock v. *the Duke of Devon-*
shire, 727 + 155
Crooke v. Davis, 218 + 64
Cross, Holloway v. 313 + (a)
Crossly v. Shaw, 314 + 85

D.

- Davis, Crooke v. 218 + 64
Delmada v. Motteux, o. 255 +,
Addend.
Denn, *Lessee of Geering*, v. Shen-
ton, 268 + 76

E.

- Ealing, *the King v. the Inhabitants*
of, 46 + 16
East-India Company, (*the*) Edie v.
640 + 130
Edie v. *the East-India Company*,
640 + 130
Edwards, Floyer v. 744 + 161
——, Palmer v. o. 187 + 59
Ellis v. Galindo, o. 250 + 71
Endon, *the King v. the Inhabitants*
of, o. 227 +
Essex, *the King v. the Justices of*,
o. 554 +
Estcourt v. Warry, 505 + 108
Evely, Slowly v. 169 + 56
Evelyn & Nash, Hall v. 554 +
Ewer, Ross v. 709 + 150
Eyre, Boone v. 691 + 154
Fabrigas, Mostyn v. 112 + 48
Finch v. Throgmorton, 58 + 29
Findal v. Brown, 515 + 110
Fisher v. Anthon, o. 650 + 132
—— v. Lane, 380 + 95
Fletcher, Price v. 667 + 137
Floyer v. Edwards, 744 + 161
Forbes, Isquierdo v. o. 6 + 3
Ford v. Parr, 108 + 46
Foster v. Bonner, 62 + 30
Fountain v. Coke, 141 + 51, Ad-
dend.
Frogmorton v. Wright, 764 +
164

Fyldes,

INDEX OF CASES CITED, &c.

Fyldes, Doe, *Lessee of* Hanson, v. 268 + 76

G.

Gale v. Machell, o. 588 + 120, 790 + 169

Galindo, Ellis v. o. 250 + 71

Geering, Denn, *Lessee of*, v. Shenton, 268 + 76

Golightly, Jaques v. 698 + 146

Goodright v. Allin, 764 + 164, *Lessee of* Rolfe, Har-

wood v. 40 + 16, 731 + 157

Goodtitle v. Knot, 721 + 154

Gofs v. Tracey, 141 + 51

Goyton, Weller v. 169 + 56

Gregson, Meyer v. o. 588 + 120, 790 + 169

Greenhill v. Greenhill, 718 + 153

Griffiths, Morgan v. 267 + 75

Groneman, Reeks v. 467 + 106

H.

Hall v. Evelyn & Nash, o. 554 + 1, Medcalf v. o. 515 + 110

Hall, Pinkney v. 653 + 134

Hanson, Doe, *Lessee of*, v. Fyldes, 268 + 76

Hartley, Poreau v. o. 650 + 132

Harwood v. Goodright, *Lessee of* Rolfe, 40 + 16, 731 + 157

Hassells v. Simpson, o. 89 + 39 to 93 + 297 + 78

Heath, Butterfield v. o. 721 + 154

Hemmings v. Smith, o. 175 + 57

Henkle v. the Royal Exchange Assurance Company, 254 + 72

Herrick, Inge v. o. 675 + 141

Heskuyson v. Woodbridge, o. 166 + 55

Hewit v. Mantell, 316 + 86

Hide v. Mason, 40 + 16

Hiles v. Meredith, o. 263 + 73, Addend.

Hill, Platt v. 97 + 41

Hogan v. Jackson, 764 + 164

Holford, Lade v. 721 + 154

Holloway, Crofs v. 313, (a)

Holmes, Stean v. 246 + 69

Hopkinson, Street v. 731 + 157

Horne, the King v. 158 + 53

Hunt, Blackwell v. 42 + 15

—, Whitfield v. o. 725 + 155

Hussey v. Jordan, o. 382 + 97

I.

Jackson v. Trinder, 467 + 105

—, Hogan v. 764 + 154

Jacky v. Butler, 651 + 133

Jaques v. Golightly, 698 + 146

Ibbetson v. Beckwith, 764 + 164

Jenkin v. Whitehouse, 709 + 150

Jenkins, *Lessee of* Yate, v. Church, 54 + 26

Inge v. Herrick, o. 675 + 141

Ingham, Noke v. 169 + 56

Ingram, the Queen v. 730 + 156

Johnson v. Spiller, o. 167 + 585 + 118

—, Salucci v. o. 583 + 117

Jones v. Randall, 594 + 122

— v. Rees, o. 263 + 73

— v. Thomas, o. 263 + 73

—, Stainton v. o. 380 + 96

Jordan, Hussey v. o. 382 + 97

Isquierdo v. Forbes, 6 + 3

Iveston, the King v. o. 658 + 135

K.

King (the) v. Abbot, o. 553 + 113

— v. Brograve, 563 + 115

— v. the College of Physicians, 355 + 92

— v. the Inhabitants of Ealing, 46 + 16

— v. the Inhabitants of Endon, o. 227 +

— v. the Justices of Essex, o. 554 +

— v. Horne, 158 + 53

King

INDEX OF CASES CITED, &c.

King (*the*) v. Ivelton, o. 638 + 13
 — v. Lakenham, o. 563 + 115
 — v. Miller & Reeve, o. 554 +,
 555 +
 — v. *the Inhabitants of* Mitcham,
 o. 226 + 65, 564 + 116
 — v. *the Inhabitants of* North
 Curry, o. 631 + 129
 — v. *the Inhabitants of* Saint
 James's, Bury St. Edmunds, o.
 227 +
 — v. *the Inhabitants of* Saint
 Lawrence, o. 227 +
 — v. *the Justices of* Southamp-
 ton, o. 554 +
 — v. *the Justices of* Suffolk, o.
 554 +
 — v. Theed, T. & M. 5 Geo. 2.
 554 +, 555 +, & + 114
 — v. Lord Waltham, o. 667 +
 137
 — v. Wilde, 97 + 41
 Knot, Goodtitle v. 721 + 154

L.

Lade v. Holford, 721 + 154
 Lakenham, *the King* v. o. 563 + 115
 Lane v. Wheat, o. 313 + 84
 —, Fisher v. 380 + 95
 Langford, Price v. 780 + 166
 Lawrence, Parker v. 169 + 56
 Leadbeter v. Markland, 314 +
 Leader v. Moxon, 62 + 31
 Leake, Bush v. o. 431 + 100
 Ledwick v. Catchpole, o. 360 + 93
 Lewes, Barzillay v. o. 583 + 117
 Liotard, Cox v. 166 + 55
 London Assurance Company (*the*) v.
 Sainsbury, o. 707 + 149
 Long v. Allah, o. 790 + 169
 Loveacres v. Blight, 764 + 164
 Lowe, Aylett v. 6 + 4

M.

Mace v. Cadell, 167 +, 320 + 87

Machell, Gale v. o. 558 + 120
 790 + 169
 Mantell, Hewett v. 316 + 16
 Markland, Leadbeter v. 314 +
 Marlow, Wadham v. o. 188 +
 Martin v. Podger, 42 + 18
 — v. Winder, 199 + 63
 —, Pugh v. 62 + 36
 Mason v. Sainsbury, o. 707 + 149
 —, Hide v. 40 + 16
 Mayne v. Walter, o. 583 + 117
 Medcalfe v. Hall, o. 515 + 110
 Meredith, Hiles v. o. 263 + 73,
 Addend.
 Meyer v. Gregson, o. 588 + 120,
 790 + 169
 Miller & Reeve, *the King* v. o. 554
 +, 555 +
 Mills, Taylor v. 168 +
 Mitcham, *the King* v. *the Inhabit-*
ants of, o. 226 + 65, 564 + 116
 Modigliani, Baillie v. o. 235 + 68
 Moody's Case, 114 + 49
 Moore v. Musgrave, 669 + 138
 Morgan v. Griffiths, 267 + 75
 Morris, Browning v. 698 + 146
 Mostyn v. Fabrigas, 112 + 48
 Motteux, Delmada v. 254 +, Ad-
 dend.
 Moxon, Leader v. 62 + 31
 Muller, Philpot v. 169 + 56
 Mulliner v. Wilkes, o. 96 + 40,
 431 + 100
 Musgrave, Moore v. 669 + 138
 N.
 Newland, Beckley v. 40 +, Ad-
 dend.
 Newton, Woode v. 62 + 36
 Noke v. Ingham, 169 + 56
 North Curry, *the King* v. *the Inha-*
bitants of, o. 631 + 129
 Nutt, Shulbred v. o. 438 + 101

Palmer

INDEX OF CASES CITED, &c.

Palmer v. Edwards, o. 187 + 59
 Parker, Lawrence v. 169 + 56
 Parr, Ford v. 108 + 46
 Pennant's Case, 58 + 29
 Perrot, Brangwin v. 50 + 20
 Peterkin v. Samson, o. 330 + Addend.
 Philpot, Muller v. 169 + 56
 Pierce, Dunstar v. 684 + 144
 Pinkney v. Hall, 653 + 134
 Plantamour v. Staples, o. 790 + 169
 Platt v. Hill, 97 + 41
 Podger, Martin v. 42 + 18
 Poreau v. Hartley, o. 650 + 132
 Price v. Fletcher, 667 + 137
 — v. Langford, 180 + 106
 Pritchard, Bolland v. 466 + 173
 Pugh, Martin v. 62 + 30

Q

Queen (the) v. Ingram, 730 + 156

R.

Randall, Jones v. 594 + 122
 Reeks v. Groneman, 467 + 106
 Rees, Jones v. o. 263 + 73
 Rennalls v. Cooper, o. 108 + 45
 Reynolds v. Beerling, o. 112 + 47
 Rich v. Coe, 105 + 44
 Roe v. Blackett, 764 + 164
 Rolfe, Harwood v. Goodright, *See of*, 40, + 16, 731 + 157
 Rofs v. Ewer, 709 + 150
 Royal Exchange Assurance Company (the) v. Henkle, 254 + 72

S.

Sainsbury, the London Assurance Company v. o. 707 + 149
 —, Mason v. o. 707 + 149

Saint James's, *Bury St. Edmunds*, the King v. the Inhabitants of, o. 227 +

— Lawrence, the King v. the Inhabitants of, o. 227 +

Salomons v. Stavely, o. 684 + 144

Salucci, Johnson v. o. 583 + 117

—, Woodmalls v. o. 583 + 117

Samson, Peterkin v. o. 330 + Addend.

Shaw, Crossley v. 314 + 85

Shenton, Denn, *Lessee of* Geering, v. 268 + 76

Shirley v. Wilkinson, o. 306 + 81

Shulbred v. Nutt, o. 438 + 101

Simpson, Haffels v. o. 89 + 39 + 93 + 297 + 78

Slater v. Carne, o. 431 + 100

Slowley v. Eveley, 169 + 56

Smith, Hemmings v. o. 175 + 37

Southampton, the King v. the Justices of, 554 +

Southcote v. Braithwaite, o. 218 + 64, Addend.

Spiller, Johnson v. o. 167 +, 585 + 118

Staples, Plantamour v. o. 790 + 169

Stavely, Salomons v. o. 684 + 144

Stainton v. Jones, o. 380 + 96

Stean v. Holmes, 246 + 69

Street v. Hopkinson, 731 + 157

Stewart, Worral v. o. 72 + 35

Stiles, Cowper v. 54 + 26

—, Walford v. 764 + 164

Suffolk, the King v. the Justices of, o. 554 +

Surecold, Durrant v. o. 228 + 66

Sutton v. Sutton, 40 + 16

Sweetapple, Appleton v. o. 515 + 110

T.

Tamm v. Williams, o. 380 + 95

Taylor, Mills v. 168 +

Thee, the King v. T. & M. 5

Gen. 2. 554 +, 555 +, & + 114 Thomas,

INDEX OF CASES CITED, &c.

Thomas, Jones v. o. 263 + 73
Throgmorton, Finch v. 58 + 29
Tracy, Gofs v. 141 + 51
Treats, Carlisle v. 669 + 138
Trinder, Jackson v. 467 + 105

V.

Vickery, Carwick v. o. 653 + 134

W.

Wadham, Marlow v. o. 188 +
Walford Stiles v. 764 + 164
Walter, Mayne v. o. 583 + 117
Waltham, the King v. Lord, o. 667
+ 137
Warry, Estcourt v. 505 + 108
Walsh v. Bishop, 169 + 56
Weakly, Lessee of Yea, v. Buck-
nell, 22 + 8
Weller v. Goyton, 169 + 56
Weymouth, Dundas v. Lord, 667
+ 136
Wheat, Lane v. o. 313 + 84

Wheate, Burgess v. 526 + 111
Whiffin, Chilton v. 166 + 55
Whitehouse, Jenkin v. 709 + 150
Whitefield v. Hunt, o. 727 + 155
Wilde, the King v. 97 + 41
Wilkes, Mulliner v. o. 96 + 40,
431 + 100
Wilkins v. Williams, o. 263 + 73
Wilkinson, Shirley v. o. 306 + 81
Williams, Wilkins v. o. 263 + 73
+ Tamm v. o. 380 + 95
Wilson, Baile v. 141 +, Addend.
Winder, Martin v. 199 + 63
Wood v. Newton, 62 + 30
Woodbridge, Heskuyson v. o. 166
+ 55
Woodmats, Salucci v. o. 583 + 117
Worral v. Stewart, o. 72 + 35
Wright, Frogmorton v. 764 + 164

Y.

Yate, Jenkins, Lessee of, Church v.
54 + 26
Yea, Weakly, Lessee of Bucknell,
v. 22 + 8

INDEX

OF

CASES CITED, &c.

In the Additional Notes to this Third Edition.

A.

ANDRE v. Fletcher, 471, n. [13]

B.

Badkin v. Powell, 42, n. [12] [13]

Bailie v. Willson, 141, n. [13] [2]

Barbe v. Parker, 669, n. [138] [13]

Barker v. Edmunds, n. [138] [13]

Beaufoy (*Ex parte*), 168, n. [13]

Beckley v. Newland, 39, n. [13]

Bennet's (*Master*) *Case*, 665, n. [13]

Benson v. Parry, 236, n. [13]

Bent v. Baker, 141, n. [13] [1]

Bevan v. Delahay, 207, n. [8] [13]

Bickerdicke v. Bellman, 514, n. [13]

Bonafous v. Walker, 5, n. [13]

Boothman v. *Earl of Surry*, 42, n. [13] [1]

Borman v. Bellamy, 384, n. [13]

Boucher v. Lawson, 6, n. [13] [2]

Brookes v. Lloyd, 164, n. [13]

Brymer (*Ex parte*), 168, n. [13]

Buck v. Wright, 283, n. [13] [70] [13]

Bullock v. Barrow, 797, n. [13]

Burroughs v. Jamineau, 6, n. [13] [2]

Burton (*Ex parte*), 101, n. [13]

Bute, *Lord*, v. Grindall, 305, n. [13]

C.

Cazalet v. *St. Barbe*, 234, n. [13] [68] [13]

Churchill v. Wilkins, 15, n. [13]

Clanrickarde, *Lord* (*Ex parte*), 168, n. [13]

Cockfrott v. Bennet, 101, n. [13]

[13] [42] [13], 472, n. (a), 697, n. [13]

Collins v. Forbes, 320, n. [87] [13]

Collis v. Emet, 516, n. [13]

Coope v. Eyre, 373, n. [13]

Cotterell v. Jolly, 781, n. [13] [167] [13]

Cromwell's (*Lord*) *Case*, 97, n. [13]

Dalmada

INDEX OF CASES CITED, &c.

D.

- Dalmada v. Motteux, 255, n. [10]
 Darby v. Coscus, 378, n. (q) [10]
 Darling v. Hill, 665, n. [10 2]
 Davies v. Pierce, 732, n. [10]
 [† 157 10]
 Davis v. Mazzinghi, 468, n. [10*]
 Doe, Lessee of Bristowe, v. Pegge,
 721, n. [† 154 10]
 Doe, Lessee of Hodsdon, v. Staple,
 721, n. [† 154 10]
 Doe, Lessee of Vesley, v. Wilkinson,
 79, n. [10]

E.

- Edmonson v. Mackell, 252, n. (a) [10]
 Ekins v. Mackhole, 512, n. [10]
 Ellis v. Smith, 244, n. [10]
 Entwistle v. Shepherd, 753, n. [10]
 [† 164 10]
 F. [10]
 Fellers (Lord) v. Shirley, 93, n. [10]
 Fielder v. Starkin, 24, n. [10 1]
 Fitcherbert v. Mather, 261, n. [10]
 Fitzroy v. Gwillim, 698, n. [10]
 Fletcher v. Smeton, 764, n. [10]
 [† 164 10]
 Ford v. Grey, 485, n. [10]
 Ford v. Hopkins, 512, n. [10]
 Fountain v. Coke, 141, n. [10]
 [† 51 10]
 Fowles v. Mackintosh, 330, n. [10]
 Frith v. Leroux, 753, n. (s) [10]

G.

- Galbraith v. Neville, 5, n. [10 2]
 732, n. [† 157 10]
 Gift v. Mason, 650, n. [† 157 10]
 Goff, qui tam, &c. v. Popplewell,
 114, n. [10]
 Gould v. Jones, 93, n. [10]

- Grayson v. Atkinson, 244, n. [10]
 Green v. Bennet, 115, n. [10]
 Green v. Hearn, 316, n. [10 2]
 Griffiths v. Williams, 624, n. [10]
 Gulliver v. Drinkwater, 585, n. [10 2]
 Gwinnett v. Philips, 669, n. [† 138 10]

H.

- Hankey v. Smith, 438, n. [† 101 10]
 Hays v. Bryant, 9, n. [10]
 Hedges v. Sandon, 96, n. [† 40 10],
 430, [† 100 10]
 Henderson v. Withy, & al. Bail of
 O'Bryen, 61, n. [10]
 Hiles v. Meredith, 263, n. [† 73 10]
 Hoare v. Contencin, 373, n. [10]
 Hobson v. Campbell, 467, n. [† 106 10]
 Hockrill (or Hockley) v. Merry,
 167, n. [10]
 Holby v. Bray, 97, n. [10]
 Holdfast v. Martin, 764, n. [† 164 10]
 Holman v. Johnson, 253, n. [10]
 Hotham v. East India Company,
 694, n. [10]
 Hubbard v. Pacheco, 468, n. [10]
 Hunter v. Potts, 170, n. [10]

J.

- Jaques v. Widey, 472, n. (s) 697, n. [10]
 Jennings v. Webb, 53, n. [† 22 10]
 Jones v. Morgan, 340, n. [2 10]

K.

- King v. Gamlingay, 53, n. [† 22 10]
 — v. Rippet, 194, n. [10]
 669, n. [† 138 10]
 Kirk v. Nowill, 678, n. [2 10]
 Ladbroke

INDEX OF CASES CITED, &c.

L.

Ladbroke v. Crickett, 378, n. (q) [☞]
 Laing v. Cundale, 467, n. [☞]
 Lee v. Libb, 242, n. [b☞] 244, n. [☞]
 Lethieullier v. Tracy, 433, n. [☞]
 Lewes v. Harris, 207, n. [8☞]
 Lonsdale (*Ld*) v. Church, 49 [☞]
 Lowndes v. Horne, 406, n. [1☞]
 Lumley v. Palmer, 299, n. [☞]

M.

Macrae v. Tall, 764, n. [† 164☞]
 Martin v. Court, 168, n. [☞]
 Mason v. Vere, 167, n. [☞]
 Maundy v. Maundy, 760, n. [☞]
 Maydwell (*Ex parte*), 168, n. [☞]
 Messenger v. Armstrong, 176, n. [☞]
 Milward v. Thatcher, 398, n. [☞]
 Mitchell v. Edie, 234, n. [† 68☞]
 Mitchell v. Gibbons, 330, n. [☞]
 Morgan v. Hughes, 215, n. [☞]

N.

Nerot v. Wallace, 697, n. [☞]

O.

Orr v. Churchill, 376, n. [☞]

P.

Paul v. Jones, 165, n. [☞]
 Peterkin v. Sampson, 330, n. [☞]
 Pomery v. Partington, 574, n. [☞]

R.

Rann v. Hughes, 683, n. [☞]
 Rashleigh v. Salmon, 316, n. [☞]
 Radwell v. Shadwell, 696, n. [☞]

Rex v. Aire Navigation, 305, n. [☞]

Rex v. Amery, 437, n. [1☞] 535, n. [1☞]

Rex v. Bishop of Chester, 526, n. [☞]

Rex v. Bryant, 486, n. [1☞]

Rex v. Bowes, 467, n. [☞]

Rex v. Cheshunt, 563, n. [☞]

Rex v. Crowther, 346, n. [☞]

Rex v. Eaton, 751, n. [2☞]

Rex v. Haigh, 332, n. [☞]

Rex v. Heaven, 157, n. [1☞]

Rex v. Inhabitants of Folkestone,

226, n. [† 65☞]

Rex v. Justices of Herefordshire,

103, n. [☞]

Rex v. Jones, 463, n. [☞]

Rex v. London, 97, n. [12☞]

401, n. [☞]

Rex v. Maddern, 563, n. [☞]

Rex v. Palmer, 427, n. [☞]

Rex v. Sandford, 658, n. [1☞]

Rex v. Mayor of Shrewsbury, 157,

n. [1☞]

Rex v. Webster, 283, n. (a) [☞]

Roberts v. Herbert, 669, n. [† 138☞]

Roe, Lessee of Gregson, v. Harrison,

57, n. [☞]

Roe, Lessee of Hunter, v. Galliers,

184, n. [☞]

Rogers, Lessee of Dawson, v. Briggs,

673, n. [† 164☞]

S.

Salucci v. Johnson, 599, n. [☞]

Samuel v. Evans, 97, n. [12☞]

Say and Sele (*Vise.*) v. Stephens,

97, [☞]

Shardelow v. Naylor, 708, n. [☞]

Sheddon v. Carnes, 330, n. [☞]

Sheldon v. Baker, 468, n. [☞]

Shrewsbury (*Mayor of*) v. Kynaston,

732, n. [† 157☞]

Skipp v. Harwood, 651, n. [1☞]

Smith v. Hickson, 669, n. [† 138☞]

Southcote

INDEX OF CASES CITED, &c.

Southcote v. Brathwaite, 217, n.

[+ 64]

U.

Spiers v. Parker, 682, n. [1]

Spring v. Biles, 717, n. [1]

Utterton v. Vernon, 584, n. [1]

St. Albans (*Duke of*) v. Shore,

790, n. [1]

V.

Stewart v. Dunlop, 262, n. [1]

Stonehouse v. Evelyn, 244, n. [1]

Vaughan v. Lewis, 157, n. [1]

T.

W.

Taylor t. Rains, 708, n. [1]

Touffaint v. Martinant, 168, n.

[1]

Wealthy, *Lessee of* Manley, v. Bos-

ville, 265, n. [1]

Towers v. Barrett, 24, n. [2]

Winch v. Fenn, 236, n. [1]

Trueman v. Fenton, 101, n. [+ 42

[1]

Woodgate v. Knatchbull, 42, n.

[2]

Trevor v. Wall, 732, n. [+ 157

[1]

Wyvill v. Shppard, 669, n. [+ 138

[1]

Truffel v. Aston, 97, n. [1]

Tuffnell v. Page, 764, n. [+ 164

[1]

Y.

Tyson v. Gurney, 735, n. [+ 158

[1]

Yates v. Hall, 650, n. [1]

Young v. Hockley, 167, n. [1]

JUDGES of the Court of KING's BENCH
during the Period of these Reports.

WILLIAM Earl of MANSFIELD, Lord Chief Justice.

EDWARD WILLES, Esq.

SIR WILLIAM HENRY ASHHURST, Knt.

FRANCIS BULLER, Esq.

ATTORNEYS GENERAL.

ALEXANDER WEDDERBURN, Esq.

JAMES WALLACE, Esq. (appointed Aug. 1780.)

SOLICITORS GENERAL.

JAMES WALLACE, Esq.

JAMES MANSFIELD, Esq. (appointed Sept. 1780.)

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JAMES WALLACE, Esq. (appointed 1812)

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JAMES WALLACE, Esq.

JAMES MANSFIELD, Esq. (appointed 1812)

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

the Nineteenth Year of the Reign of GEORGE III.

WALKER and Others, Assignees of BEAN, a Bankrupt, and MACKENZIE, and Others, Assignees of CUTHBERT, a Bankrupt, against WITTER.

1778.
Saturday,
7th Nov.

THIS was an action of debt, brought in the county of *Middlesex*, on a judgment in the supreme court in *Jamaica*.—The first count of the declaration was in the following words: "*William Witter, of the parish of St. Mary le Bone, in the county of Middlesex, Esq;* was summoned to answer *Isaac Walker, Francis Newton, and John Colwill, assignees of the estate and effects of Samuel Bean, a bankrupt, within the true intent and meaning of the statutes made and provided, and now in force, concerning bankrupts, and Colin Mackenzie, Thomas Bell, and Alexander Grant, assignees of the estate and effects of Lewis Cuthbert, a bankrupt, &c.* that he render to them 594*l. os. 4d.* of lawful money of Great Britain, which he owes to, and unjustly detains from them.—For that whereas the said *Samuel, Lewis,*

VOL. I. B and

An action of debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment. —If he conclude "*prout patet per recordum,*" that is to be rejected as surplusage, and the defendant cannot plead null tiel record.

1778:

WALKER
against
WITTER.

[2]

and also one *David Bean*, since deceased, in the life-time of the said *David*, and which said *David*, afterwards, and before the said *Samuel* and *Lewis* became bankrupt, died, and the said *Samuel* and *Lewis* survived him; that is to say, at *Westminster* in the county of *Middlesex*, heretofore, to wit, on the last *Tuesday* in *May*, in the sixth year of the reign of our sovereign lord the now king, and in the year 1766, in a certain court of record of our said lord the king, called the supreme court of judicature held for our said lord the king, at the town of *St. Jago de la Vega*, in the county of *Middlesex*, in and for the island of *Jamaica*, and within the jurisdiction of the said court, on the said last *Tuesday* of *May*, in the said sixth year of our said lord the now king, and in the year 1766, before the honourable *Thomas Beach*, Esq; chief judge of the said court, and his associates then sitting judges of the same court, by the consideration and judgment of the same court, recovered against the said *William* a certain debt of 220*l.* current money of the said island of *Jamaica*, and also 1*l.* 16*s.* 3*d.* for their costs and charges by them, about their suit, in that behalf expended, to the said *Samuel*, *Lewis* and *David Bean*, in the life-time of the said *David*, by the said court of their assent adjudged, whereof the said *William* is convicted, as by the record and proceedings thereof remaining in the said court at the town of *St. Jago de la Vega*, more fully appears: which said judgment still remains in that court in full force, unreversed, unpaid and unsatisfied; that is to say, at *Westminster* in the said county of *Middlesex*; and that neither the said *Samuel*, *Lewis* and *David*, or either of them in the life-time of the said *David*, nor the said *Samuel* and *Lewis*, or either of them, since his decease, nor the said *Isaac*, *Francis*, *John*, *Colin*, *Thomas* and *Alexander*, as assignees as aforesaid, or either of them, have yet obtained execution of the aforesaid judgment; and the said *Isaac*, *Francis*, *John*, *Colin*, *Thomas* and *Alexander* in fact say, that the debt, costs and charges aforesaid, so recovered as aforesaid, amount to a large sum of money, to wit, to the sum of 158*l.* 8*s.* 9*d.* of like lawful money of *Great Britain*, that is to say, at *Westminster* aforesaid in the said county of *Middlesex*, whereby an action hath accrued to the said *Isaac*, *Francis*, *John*, *Colin*, *Thomas* and *Alexander*, as assignees aforesaid, to demand and have, of and from the said *William*, the said sum of 158*l.* 0*s.* 9*d.* of lawful money of *Great Britain*, parcel of the sum of 594*l.* 0*s.* 4*d.* above demanded.—Then there was a second count in the same form, stating a like judgment of the court in *Jamaica* for 608*l.* and 1*l.* 16*s.* 3*d.* costs, of *Jamaica* currency, or 435*l.* 11*s.* 7*d.* sterling, being the residue of the sum of 594*l.* 0*s.* 4*d.* demanded in the action.—The defendant

besides

besides *nil debet*, pleaded also to the first count, "*That there is not any such record of the recovery of the said debt, costs and charges in the said first count of the said declaration mentioned* * against him the said *William*, in the said court of record of our said lord the king, called the supreme court of judicature held for our said lord the king at the said town of *St Jago de la Vega*, in the said county of *Middlesex*, in and for the said island of *Jamaica*, and within the jurisdiction of the said court, before the honourable *Thomas Beach*, Esq; chief judge of the said court, and his associates, then sitting judges of the same court, as the said plaintiffs have, in the said first count of their said declaration, alleged, and this he is ready to verify; wherefore, &c."—There is a similar plea to the second count.—Upon the *nil debet*, the plaintiff took issue, and the trial coming on at the sittings in *Westminster Hall*, after *Easter Term* 1778, a verdict was found for the plaintiffs.—To the pleas of *null tiel record*, the plaintiffs replied, that there was such record, &c. (in the words of the pleas) "and this they the said plaintiffs are ready to verify by the said record; and thereupon a day is given to the said plaintiffs on, &c. to come before our said lord the king wherever, &c. to produce the said record, and the same day is given to the said defendant."

1778.

WALKER

against

WITTER,

* [3]

In *Trinity Term*, 18 *Geo.* 3. these issues in law came on to be argued; the judgment on which the action was brought, having been brought into court, under the seal of the court of *Jamaica*.

The *Solicitor General* (*Wallace*,) and *Dunning*, for the plaintiffs; *Graham*, *Bower*, and *S. Heywood*, for the defendant.—The case stood over till this day, when it was again argued by the same counsel.

For the defendant, several grounds were taken.—It was contended, that an action of debt could not be maintained on a judgment in a foreign court; or, that, if debt would lie, yet it could not be maintained as on a specialty, but that the consideration of the judgment ought to be shewn in the declaration. Then, if this judgment were to be considered as a specialty, the court had no jurisdiction, because actions on judgments are local, and must be tried in the county where the judgment is given.—These objections, if successful, would have entitled the defendant to an arrest of judgment on the verdict found for the plaintiffs on the *nil debet*.—On the issues joined on the *null tiel record*, it was insisted, that there must be judgment for the defendant, because the judgment in *Jamaica* was not a record, in the proper legal sense of the word.

For the plaintiffs, it was said, that it is an established maxim, that, where *indebitatus assumpsit* will lie, debt will also lie; and that this court had determined, in the case of

1778.

WALKER
against
WITTER.

Crawford v. Whittal (1), that *indebitatus assumpsit* may be maintained on a foreign judgment. That it was also determined, in that case, that the judgment is, of itself, *prima facie* evidence of the debt, and, therefore, the plaintiff is not bound to shew any other consideration. That, in *Sinclair v. Fraser* (b), which was an appeal from the court of session in Scotland to the house of lords, in the case of an action brought in that court on a judgment in Jamaica, it was laid down, as a general principle, that such a judgment is *prima facie* evidence of a debt, though it is competent to the defendant to impeach the justice of the judgment, by shewing it to have been irregularly, or unduly, obtained. That the plea of *nul tiel record* was absurd, and that the judgment ought to be the same as if there had been no such plea.

Upon this, and the former occasion, were cited (among other authorities) besides *Crawford v. Whittal*, and *Sinclair v. Fraser*, the cases of *Olive v. Gwin* (c), *Otway v. Ramsey* (d), and *Campbell v. Hall* (e). † 1.

Lord

(a) H. 13 Geo. 3. B. R.

[1] The cause of *Crawford v. Whittal* was argued and determined in B. R. H. 13 G. 3. It was an action of *indebitatus assumpsit*, brought by *Crawford* as administrator of one *Hargrave*, in which he declared, that the defendant was indebted to him, as administrator, "in the sum of 747l. sterling, for 6904 rupees 10 annas and 9 pice, of current money of Bengal in the East Indies, by a certain judgment of the honourable the mayor's court at Calcutta, at Fort William in Bengal aforesaid, holden before, &c. before that time, viz. on, &c. adjudged and awarded to be paid by the said defendant to the said plaintiff, as administrator as aforesaid, for a certain demand of the said plaintiff, as administrator as aforesaid, sued and prosecuted in the same court, of 5801 rupees, &c. together with interest due thereon from, &c. till, &c. at the rate of, &c. being, &c. current money of Bengal aforesaid, and costs of suit, being, &c. making together the said sum of 6904 rupees, &c. which said judgment is in force and unsatisfied; and which said

6904 rupees, &c. at the time of recovering the said judgment, were and yet are of the value of the said 747l.; and being so indebted, the defendant, afterwards, in consideration of the premises, undertook to pay."—There were other counts to the like effect; some of them stating the sum only in East India money,—some varying the amount,—and some stating the judgment without adding, "for a certain demand, &c."—The defendant demurred specially to this declaration, and shewed for cause, that there was no proof of the letters of administration. —It was argued, on Tuesday, the 9th of February, by Fearnly for the defendant, and Mansfield for the plaintiff. —Two points were made for the defendant: 1. That assigned for cause of demurrer; 2. An objection to the substance of the declaration, viz. that the grounds of the judgment abroad, and the cause of action there, ought to have been shown. The cases of *Duplein v. De Roven* (f), and *Bowles v. Bradshaw* (g), (which was *indebitatus assumpsit* on a judgment in the court of

Exchequer.

(b) Cited in the *Dutchess of Kingston's Case*, p. 64.

(c) T. 1658. Hard. 118.

(d) E. 11 G. 2. B. R. 2 Str. 1090.

(e) M. 15 G. 3. B. R.

† 1 Since reported, Cowp. 204

(f) 2 Vern. 540.

(g) M. 22 Geo. 2. MSS.

Lord MANSFIELD, now and on the former occasion, said, that the plea of *nul tiel record* was improper. Though the plaintiffs had called the judgment, a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the courts of *Westminster Hall*. They had not mislead the court nor the defendant, for they spoke of it as a record of a court in *Jamaica*. The question was brought to a narrow point, for it was admitted on the part of the defendant, that *indebitatus assumpsit* would have lain, and on the part of the plaintiffs, that the judgment was only *prima facie* evidence of the debt. That being so, the judgment

1778.

WALKER
against
WITTER.

Exchequer in Ireland) were cited. As to the first point, the court said, that profert of the letters of administration was unnecessary; because, in this action the plaintiff had no occasion to have described himself as administrator [C].—Second point; *Aston*, Just. The declaration is sufficient; we are not to suppose it an unlawful debt. *Wybburst*, Just. I have never seen this doubted; I have often known *assumpsit* brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise.—Judgment for the plaintiff.—In the case of *Sinclair v. Fraser*, an action had been brought by *Sinclair* in the court of session in *Scotland*, upon a judgment in the supreme court in *Jamaica*. The court of session determined that the plaintiff was bound to prove before them the ground, nature, and extent, of the demand on which the judgment in *Jamaica* had been obtained. But, upon an appeal to the house of lords they reversed the decision of the court below, pronouncing the following special order of reversal: "It is declared that the judgment of the supreme court of *Jamaica* ought to be received as evidence, *prima facie*, of the debt, and that it lies upon the defendant to impeach the justice thereof, or to shew the same to have been irregularly or fraudulently obtained: it is therefore ordered and adjudged, that the said several

interlocutors complained of be, and the same are hereby reversed." (b)—While the case of *Walker v. Witter* was depending, a writ of error was to have been argued in the *Exchequer* chamber, in a cause of *Pluistow v. Van Uxem*, which is the last case that has arisen upon this question relative to foreign judgments. It was an action of *indebitatus assumpsit* in *B. R.* on a judgment in a court called the court of ordinance at *Ghent*. The plaintiff *Van Uxem* had a verdict, and judgment, upon the second count of his declaration, which only stated that the defendant was indebted to the plaintiff in, &c. upon and by virtue of a judgment obtained in the said court; "and being so indebted," &c. without saying any thing of any demand for which the judgment was given.—*Beaumont* had moved the court of *B. R.* in arrest of judgment, but was refused a rule to shew cause.—The plaintiff in error assigned for errors, specially, That it did not appear by this second count upon what account the judgment abroad was given; and that it did not appear that it was given on account of any just debt or for any other good and sufficient cause of action.—The cause was set down for argument on the 26th of June, T. 18 Geo. 3. but no body appeared to argue on the part of the plaintiff in error: and the judgment was affirmed of course.

[C] S. P. *Bonafous v. Walker*,
R. M. 28 Geo. 3. 2 Term. Rep.
26. 128. n. (a).

(b) 4th March 1771, cited in the
Dutche's of Kingston's Trial, 11 Hargr.
St. Tr. 122. col. 2.

1778.

WALKER
against
WITTER.
* [6]

ment was not a specialty, but the debt only a simple contract debt; for *assumpsit* will not lie on a specialty. The difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. That description is confined properly to certain courts in *England*, and their judgments cannot be controverted. Foreign courts [*¶* 1], and courts in *England* not of record, have not that privilege, nor the courts in *Wales*, &c. but the doctrine in the case of *Sinclair v. Frazer*, was unquestionable [*¶* 2]. Foreign judgments are a ground of action every where, but they are examinable. He recollected a case of a decree on the chancery side in one of the courts of great sessions in *Wales*, from which there was an appeal to the house of lords, and the decree affirmed there; afterwards, a bill was filed in the court of chancery, on the foundation of the decree so affirmed, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the house of lords, because the original decree was in the court of *Wales*, whose decisions were clearly liable to be examined [*¶* 3].—[*¶* 2] (He also mentioned a case on the

mortmain

[*¶* 1] According to his lordship's opinion in *Bernardi v. Motteux*, (*infra* 581. the judgments of foreign courts of admiralty, as to matters within their jurisdiction, cannot be controverted.

[*¶* 2] S. P. in the Court of Session, *Cochran v. The Earl of Buchan*, June 1698. *Sir H. Dalr. Decisions* 1.

[*¶* 3] 1 *Eq. Ca. Abr.* 83. pl. 3. *Ifiguierdo v. Forbes*, B. R. H. 24 Geo. 3.

[*¶* 2] *Galbraith v. Neville*, B. R. E. 29 Geo. 3. Action of debt on a judgment in the supreme court of Jamaica. Verdict for the plaintiff; and a rule to shew cause why there should not be a new trial. *Law*, for the plaintiff; *Bower*, for the defendant.

Lord Kenyon, I cannot help entertaining very serious doubts concerning the doctrine laid down in *Walker v. Witter*, that foreign judgments are not binding on the parties here. But when I am told that Lord Hardwicke did not hold himself bound by a decree on the chancery side of the court of great sessions in *Wales*, affirmed in the house of lords, I own I am quite lost in a maze. How such a decree could have come in revision before Lord Hardwicke, as chancellor, I cannot conjecture. It is per-

fectly well known, that the court of great sessions is an independent tribunal, from which no appeal lies to the court of chancery. There certainly must have been something else stated that does not appear in the report. The proceedings in *Wales* might possibly have affected the rights of persons living out of that jurisdiction. In such a case, a prohibition would be granted, and the rights of such persons would not be bound. Perhaps when those rights afterwards came in question, on a similar ground, in the court of chancery, Lord Hardwicke might say, that he should not consider himself as bound by the decree in *Wales*, except as far as any deference might be due to the personal authority of the judges who had determined the question there. But to say, that he could alter or open the discussion of those rights which had been finally and lawfully settled there, is a position against which I must enter my protest. In *Moser v. Macferlan* (1), Lord Mansfield said, "The merits of a judgment can never be over-haled by an original suit, either at law or in equity. Till the judgment is set aside, or reversed, it is conclusive, as to the subject

(1) B. R. E. 33 Geo. 2. 2 Burr. 1005.

mortmain acts to the same purpose)—Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought.—(It had been said at the bar, that the value of *Jamaica* currency was fluctuating and uncertain)—It is not necessary that the plaintiff in debt, should recover the exact sum demanded [†4].

1778.

WALKER
against
WITTER.

WILLES, *Justice* of the same opinion.

ASHHURST, *Justice*, of the same opinion.—He said, that, in *indebitatus assumpsit* on a foreign judgment, the judgment is shewn as a *consideration*; and, wherever *indebitatus assumpsit* can be maintained, debt will lie.

BULLER, *Justice*, of the same opinion.—He observed, that all the old cases shew, that, whenever *indebitatus assumpsit* is maintainable, debt also is. 'Till *Slade's* case, a notion prevailed, that, on a simple contract for a sum certain, the action must be debt: but it was held in that case, that the plaintiff had his election either to bring *assumpsit*, or debt.

By

subject matter of it, to all intents and purposes (2)." And though, in the *Dutchess of Kingston's Case*, it was held, that the judgment of the ecclesiastical court might be examined, yet that was on the ground of fraud. The judges, there, were of opinion, that you might reply *per fraudem* to a judgment. That is not an authority for saying, that we can revise the judgments of the lowest courts in foreign countries, where they have competent jurisdiction.—His lordship then made some observations on the particular evidence in the case, which it is unnecessary to state.

Buller, *Justice*, The doctrine which was laid down in *Sinclair v. Fraser* has always been considered as the true line ever since; namely that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive till it be impeached by the other party. I have often heard Lord *Manfield* repeat what was said by Lord *Hardwicke* in the case alluded to from *Wales*; and the ground of his lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are in the wrong; and it was on that account, that he said, he would examine into the propriety of the decree. As to actions of this sort, see how far the court could go, if what was said in *Walker v. Witter* were de-

parted from. It was there held, that the foreign judgment was only to be taken to be right *prima facie*; that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record. But, if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record. It cannot be declared on as such, and a plea of *non tiel record*, in such a case is a mere nullity. How then can it have the same obligatory force? In short, the result is this; that it is *prima facie* evidence of the justice of the demand in an action of *assumpsit*, having no more credit than is given to every species of written agreement, viz. that it shall be considered as good till it is impeached.—He then also remarked on the particular evidence.

The rule made absolute; the court recommending, that the question of law should be put on the record, if it should arise again at the second trial.

Vide, as to the conclusive nature of foreign judgments, *Burroughs v. Jamineau*, *Canc. M.* 13 *Geo.* 1. 12. *Vin.* 87. pl. 9. *Ca. Temp. Hardw.* 87. *Boucher v. Lawson*, *B. R. H.* 8 *Geo.* 2. *Ca. Temp. Hardw.* 85. 89.

[†4] *Aylett v. Low*, *C. B. T.* 18 *Geo.* 3. 2 *Blackst.* 1211.

(2) *Burr.* 1009.

1778.

WALKER,
against
WITTER.

[7]

By the arguments in *Vaughan* (a), it seems the doctrine of *Slade's* case was not approved of at first, and from the manner in which the statute of 3 Jac. 1. c. 8. is penned, it is probable the action of *assumpsit* was not then much in use in such cases. Afterwards, however, it became very general, and that is the reason why we meet with no instances in the books, of debt brought on foreign judgments. As to the point, that the judgment is not a record, and that the defendant must have judgment on the pleas of *nul tiel record*, there is no foundation for it, because it is stated to be a judgment of a court in *Jamaica*. As such, it is to be tried by the country, (as it might have been in this case, on the *nel debit*;) and not by the court. The *prout patet per recordum* in the declaration, is absurd and may be rejected, and the plea of *nul tiel record* is a mere nullity. The plaintiffs have done right to state the judgment in the manner they have done, because that is matter of description.

Judgment for the plaintiffs.

SIMPSON and Others, against JOHNSON and Others.

Friday, 13th
Nov.

When a bastard having a different settlement from the mother, lives with her for nurture, the parish where the bastard's settlement is, must maintain it.

THIS was a case reserved for the opinion of the court, on an action of debt, on a bond.—The cause was tried before EYRE, Baron, at the last assizes for the county of *Essex*. The substance of the pleadings were as follows:—The plaintiffs having declared in the usual form, the defendants cravedoyer of the condition of the bond, which was in these words;—“Whereas *Jemima Wals* of *Wickham*, *St. Paul* aforesaid, single woman, hath by her voluntary examination taken upon oath before *Charles Harrel*, Esq. one of his Majesty's justices of the peace in and for the said county, declared herself to be with child, and that the said child is likely to be born a bastard, and to be chargeable to the said parish of *Wickham St. Paul*, and that *James Johnson* above named, wheelwright, is father of the said child; now the condition of the above obligation is such, that if the said *James Johnson*, his heirs, executors, or administrators, do, and shall from time to time, and at all times hereafter, fully and clearly indemnify, and save harmless, as well the above named churchwardens and overseers of the poor of the said parish of *Wickham St. Paul*, and their successors for the time being, as also all and singular the other parishioners and inhabitants of the said parish of *Wickham St. Paul*, which now are, or hereafter shall be for the time being, of and from all manner of costs, taxes, rates, assessments, and charges whatsoever, for or by reason

1778.

SIMPSON
against
JOHNSON.
* [8]

of the birth, education and maintenance of the said child, and of and from all actions, suits, troubles and other demands and charges whatsoever touching and * concerning the same;—Then this obligation to be void, otherwise to remain "in full force."—They then pleaded that, after the execution of the bond, and after the woman had declared that she was with child, that the child was likely to be born a bastard, and to be chargeable to the parish of *Wickham St. Paul*, and that *Johnson* was the father, she removed herself voluntarily from *Wickham St. Paul*, to the parish of *Guefingthorpe*, and was there delivered of the same bastard child, by reason whereof the said child was lawfully settled in the parish of *Guefingthorpe*, and was not, nor at any time since its birth had been chargeable to, or lawfully settled in the parish of *Wickham St. Paul*; and that of the above named churchwardens and overseers of the parish of *Wickham St. Paul*, and their successors for the time being, and the parishioners and inhabitants of the said parish or any of them for the time being, had, at any time, from the making of the bond, been damnified by reason of the birth, education and maintenance of the child, or by reason of any action, suit, trouble, and other charge whatsoever touching the same, they had been so damnified of their own proper and voluntary acts, and wrongs, and against the will of the said *Johnson* the reputed father of the said bastard child. The plaintiffs replied, that the parish of *Wickham St. Paul*, before, and at the time of the birth of the child, was, and still continued to be, the place of the mother's legal settlement, and that, soon after her delivery, she returned to *Wickham St. Paul*, and brought the child with her, to be there nursed and nurtured, that the child had remained there ever since, being still under three years of age, and that from the return of the mother with the child, till the bringing the action, neither *Johnson*, nor any other person on his behalf, had found any provision for the child; by reason whereof the inhabitants and parishioners of *Wickham St. Paul* during that time, lest the child should die for want of necessary food and nurture, were forced to expend, and did expend, the sum of, &c. in providing necessary food for the said child, and so were, otherwise than of their own wrong, damnified by reason of the maintenance of the said bastard child. The defendants in their rejoinder said (as before) that the inhabitants and parishioners of *Wickham St. Paul* had laid out the money mentioned in their replication, of their own wrong, and were damnified of their own wrong; on which rejoinder, issue was joined. The jury found a verdict for the plaintiffs with one shilling damages.—The facts, as stated in the case, were these: The defendant *Johnson* being apprehended by virtue of a warrant under the statute of 6

Gen.

1778.
 SIMPSON
 against
 JOHNSON.

Geo. 2. c. 3. gave the bond in question to indemnify the parish of *Wickham St. Paul*. Afterwards *Jemima Wags* was delivered of the child mentioned in the pleadings, which was born a bastard in the parish of *Gueffingthorpe*. After her delivery, she returned to the parish of *Wickham St. Paul*, where she was legally settled, carrying her child with her, in a state of perfect health, and received one shilling and sixpence *per week* from the plaintiff *Simpson*, one of the overseers of the poor of the parish, for the maintenance of herself and her child. No demand was made at any time on *Johnson*, who lived in the adjoining parish of *Gueffingthorpe*, but a demand was made by *Simpson* on *Robert Dolbey* (one of the co-obligors) to defray the expence above stated, which he refused to do. Lastly, there was no order made by a justice or justices of the peace, directing the allowance of one shilling and sixpence, or any other sum, to be made by the parish officers of *Wickham St. Paul*.

Peckham for the plaintiffs.—*Rous* for the defendants.

The court were so clearly of opinion with the defendants, that they would not hear their counsel.—Lord *Mansfield* said, that the payment by the parish officers of *Wickham* was doubly voluntary: first, because there had been no order upon them to pay [15]; and secondly, because they were not liable to maintain the child, but the parish where it was born; and they should have applied to the officers of that parish [2].

Judgment for the defendants.

[15] But if the child had been born in their parish, and they had paid for its maintenance, without an order, the action would have lain. *Hays v. Bryant*, C. B. T. 29 Geo. 3. H. Bl. 253.

[2] This question, viz. "Whether children under seven years of age, who are living with their mother for nurture, at the place of the mother's settlement, but whose own settlement is in another parish, are to be maintained by the parish where the mother lives and is settled, and from whence they are irremovable, or by the parish where they are settled;" came on, and was determined in the court of B. R. in H. 17 Geo. 3. in the case of *the King v. the Inhabitants of Hemlington*. The case was this:—*Elizabeth*, a single woman, with her child *Mary*, went under a certificate, from

Hemlington to *Darlington*, in which last parish she had two bastard children, and there became chargeable. An order being thereupon made for the removal of her and *Mary* to *Hemlington*, she took the two children who were born in *Darlington* with her, they being both under the age of emancipation. Two justices made an order on the parish of *Darlington* for the maintenance of the two children born in that parish; which order, upon an appeal, was quashed. *Davenport* shewed cause in support of the order of sessions. After mentioning the cases of *Wangford v. Brandon*, and others stated in *Burn*, (i) he made similar observations upon them, to those which are to be found in *Burn's* note, viz. that what had been said in those cases relative to the present question, was only matter of argument.

(i) 3 *Burn's Just.* p. 336, 337. 13th Ed.

ment, the point in dispute in all those cases having been the *settlement*, not the *maintenance*. He mentioned that *Burn*, in another place (k), seemed fully of opinion, that the parish of the mother is liable; and contended, that it was contrary to the spirit and intention of the 18 *El. c. 3.* to burthen the parish where bastards are born with their support. That the inconvenience of such a practice would be very great, in many cases where the two parishes might be situated at opposite extremities of the kingdom. That there is no statute which gives the justices any authority to make an order for the maintenance of children on a parish where they do not actually reside. That there are only two instances where a power of that nature is vested in justices, *viz.* 1. Where it is necessary to assess one parish in aid of the poor-rate of another; and 2. in the cases of paupers improperly removed. That it would be much more expedient, that the parish which is bound to maintain the mother, should also maintain, as casual poor, the children which she had a right to bring with her, and which could not be taken from her before the age of seven; and that he had been informed, that the practice had been conformable to what he contended for. *Wallace* was going to answer *Davenport*, but the court stopped him, and said that the point was clear and settled — Lord Mansfield, — Mr. *Davenport* has cited no authorities in support of Dr. *Burn's* proposition, and there are many against it, *viz.* “*Rex v. St. Giles's in the Fields* (l), *Rex v. Wangford* (m), and *Rex v. Saxmundham* (n), which is directly in point. The practice is also agreeable to those cases. — *Ashton* Just. cited another case, where it was directly held that the parish where the settlement of the nurture child is, shall maintain it. — Judgment to quash the order of sessions and confirm the original order by which the parish of *Darlington* was charged.

The case of *Saxmundham* is very short in *Fortescue* (o), and the point is merely stated as a position, without the facts or orders, or the reasoning of the court. But the case of the inhabitants of *Shermandbury v. Bolney* (o), which Mr. *Davenport* mentioned in his argument, was exactly the same with the present, for there can be no distinction (as to this question) between bastards and legitimate children, who have a different settlement from their mother. In that case, a woman with three children, all under seven, being settled in *Shermandbury*, married a person settled in *Bolney*. After the marriage, the mother and the three children were sent to *Bolney*. The parish of *Shermandbury*, before the marriage, allowed three shillings per week for three children; and the payment being discontinued after the marriage, on complaint of the parish of *Bolney*, two justices made an order that *Shermandbury* should continue to pay the three shillings. The sessions, and afterwards the court of *B. R.* confirmed the order of the justices. And the court said, “This case is within the equity of the statute for the relief of the poor, and there is no reason that *Shermandbury* should be discharged of the children by their mother's marriage.” This case is cited in *Bolt* from *Caribew*, but for another point. It has been supposed that there might be difficulties in obtaining and enforcing an order, in a case like the present. But the case of *Shermandbury v. Bolney* shews, that the justices of the county in which the parish liable is situated, ought to make the order, on the complaint of the parish officers of the parish where the mother lives. The order in the case of *Hemlington* was probably made in the same manner. The inconvenience when the two parishes are at a great distance from each other, is only similar to what

1778.

SIMPSON
against
JOHNSON.

(k) p. 326.
(l) 7. 6 & 7 Geo. 2. Burr. Settl. Cases, No. 2.

(m) 12 Wil. 3. Fortesc. 307.
(n) Transcribed by Bolt, p. 254.
(o) Carib. 279.

1778.

BEAN *against* STUPART.

A warranty on the margin of a policy must be strictly followed, as much as if written in the body of the instrument.—

“Thirty seamen besides passengers,” means thirty persons belonging to the ship’s company, including cook, surgeon, boys, &c.

THE plaintiff insured the ship called the *Martha*, at and from *London* to *New York*, the voyage to commence from a day specified; and, on the margin of the policy, were written these words,—“Eight nine-pounders with close quarters, six six-pounders on her upper decks, thirty seamen, besides passengers.”—The ship sailed from the *Downs* on the 1st of *March*, and was taken on the 10th, by an *American* privateer, and was sent, with a prize-master on board, to make the port of *Boston*. On the 30th of *May*, the plaintiff brought this action against *Stupart*, an underwriter on the policy; on which *Stupart* paid the premium into court, and pleaded the general issue. About the 6th of *July*, and before the trial, accounts were received that the ship had been retaken some time in *May* and carried into *Halifax*.—The cause came on for trial before Lord MANSFIELD, and a special jury, at *Guildhall*, at the Sittings after *Trinity Term*, 18 *Geo. 3*. The defence set up was, that there were not thirty seamen on board the ship, according to the terms of the stipulation in the margin of the policy: and, in fact, it appeared upon the evidence, that, to make up that number, the plaintiff reckoned the steward, cook, surgeon, some boys, and apprentices, and some persons described as men learning to be seamen; and that only twenty-six persons had signed the ship’s articles. It also appeared that there were seven or eight passengers on board.

Beauroft, of counsel for the defendant, contended, That this was a warranty, not a representation, and that being so, it must be literally and strictly complied with. That seamen meant men trained to the occupation of mariners, either such as are called able-bodied, or at least ordinary seamen, in opposition to landmen, and could never include boys, or the steward, cook, and surgeon, of a ship. That, at any rate, none but those who had signed the articles were to be

is experienced on appeals brought on removals from parishes at a great distance. As to the method of enforcing the order, it may be done by indictment, or perhaps the parish officers, in whose behalf it is made, might maintain a special action of *assumpsit* against those upon whom it is made, *Vide Rann v.*

Green, B. R. M. 17 *Geo. 3*. [† 5], where the court held, that when persons acting under a private act of parliament, make an order by authority of such act for the payment of money, the law raises an *assumpsit*. The same reason must hold in the case of a public act.

[† 5] *Rex v. Toms*, E. 29 *Geo. 3*. *Infra*, p. 386. *Rann v. Green*, since reported, *Comp.* 474.

be considered as seamen, and then the number warranted was not complete. That, in the late case of *Pawson* against *Ewer* [3], it had been determined, that the * strict words of the representation need not be fulfilled, provided the departure from them is not materially to the prejudice of the insurers; but that, in the case of a warranty, it is otherwise, *that* being a condition, and taken as part of the policy; and that the circumstance of the stipulation, in this instance, being written on the margin, made no sort of difference [4]. He said the nature of the voyage, which was

1778.

BEAN
against
STUART.

*[12]

[3] *Pawson v. Ewer*, *Pawson v. Snell*, and *Pawson v. Watson* [† 6], which were all actions on the same policy, were argued on a motion for a new trial in the court of King's Bench in the last term, 18. Geo. 3. The case was shortly this:—The broker who made the insurance shewed to some of the underwriters a paper detached from the policy, containing instructions relative to the force the ship was to sail with, viz.

"12 guns, and 20 men." There were 10 guns or men on board, when the policy was subscribed. Mr. Thornton, the first underwriter on the policy, had seen the paper (and he had paid). *Watson* and *Snell* had not seen it. *Ewer*, who had subscribed after them, had; but they all underwrote at the same premium, which was proved to be the premium for such a vessel as that in question, when sailing without force. The ship actually sailed with only 10 guns (four-pounders) and 6 swivels, and with only sixteen men and seven boys, besides passengers. It was proved that boys are entered on the ship's books, and considered on ship-board as men; and that 10 guns and 6 swivels are of greater force than 12 guns. That upon the whole, the ship was of more force than she would have been, if the written instructions had been specifically adhered to. There were verdicts for the plaintiffs; but on the motion for a new trial in one of the causes, which was to determine the rest, it was contended on the part of the defendant, that the instructions shewn to the first underwriter (upon whom in general all the others rely) being in writing, were to be considered as a warranty, which

must be strictly complied with; and that it had not been complied with in this case. The counsel for the plaintiff on the contrary maintained, in the first place, that the written paper being separate from the policy, was only a representation, and that it was sufficient to comply with it in substance, or to do what was equally beneficial to the underwriters; but, in the second place, that the terms had been strictly complied with, for that swivels were a species of guns, and that boys, in the maritime sense, were reckoned men or seamen, as opposed to passengers. The court were of opinion, that the word men in the marine language does include boys; but they chiefly went upon the distinction between a warranty and a representation, and held that in this case, the instructions, though in writing, yet being on a separate paper from the policy, were only a representation; and as they had not been departed from fraudulently, nor in a manner detrimental to the underwriters, the policy was in force against them.

[4] At the sittings at *Guildhall* after *M. 19 Geo. 3.* in a cause of *Kenyon* and another v. *Bertton*, the following words were written transversely on the margin of the policy: "In port 29th of July 1776."—The ship was proved to have sailed the 18th of July, and Lord *Mansfield* held that this was clearly a warranty; and though the difference of two days might not make any material difference in the risk, yet as the condition had not been complied with, the underwriter was not liable. But, though a written paper be wrapt up in the policy, when it is brought to the

1778.

BEAN
against
STUART

was of a very dangerous sort, explained the condition, and that real seamen must have been meant. He also argued (though but slightly) that, whatever might be the construction of the policy, the plaintiff was not entitled to recover as for a total loss, because the ship had been retaken, and had never been *infra prasidia hostium*. Witnesses were examined to explain what is generally understood by the word *seamen*, and it was either in proof, or admitted, that, at the custom-house and Greenwich hospital, boys are included in that word.

Lord MANSFIELD observed, in summing up to the jury, that the import of words must be collected from the subject, to which they are applied. That if, in the present case, the insured had stipulated for thirty seamen, *besides boys and landmen*, then it would have been clear that the terms had not been complied with; but that, in this policy, *seamen* were contrasted with passengers, and, in that sense, the word seemed to include boys as well as men: but he left the construction to the jury.

The jury having found a verdict for the plaintiff as for a total loss, the defendant, in this term, obtained a rule to shew cause why there should not be a new trial.

On the day for shewing cause, Lord MANSFIELD, after reporting the facts as above related, and that he had left the construction of the word "*seamen*" to the jury, observed that he himself had thought there was little doubt on the question, after what had passed in the cause of *Pawson v. Ewer*.

the underwriters to subscribe, and shewn to them at that time; or, 2. even though it be wafered to the policy at the time of subscribing, still it is not, in either case, a warranty, or to be considered as part of the policy itself, but only as a representation. The first of those points occurred in a cause of *Pawson v. Barnevelt* (p), tried before Lord Mansfield at Guildhall at the Sittings in Trinity Term, 18 Geo. 3. where the policy was the same as in the case of *Pawson v. Ewer*. The counsel for the defendant offered to produce witnesses to prove, that a written memorandum inclosed, was always considered as part of the policy. But his lordship said, it was a mere question of law, and would not hear the evidence; but decided, that a written paper did not become a strict warranty by being folded

up in the policy. The second occurred in *Bize v. Fletcher* (q) [† 7], tried at Guildhall, after E. 19 Geo. 3. where it appeared, that, at the time when the insurers underwrote the policy, a slip of paper was wafered to it, describing the state of the ship as to repairs and strength, and also mentioned several particulars of her intended voyage, which particulars, in the event, had not been complied with. Lord Mansfield ruled, that this was only a representation; and, if the jury should think there was no fraud intended, and that the variance between the intended voyage as described in the slip of paper and the actual voyage as performed did not tend to encrease the risk to the underwriters, he directed them to find for the plaintiff, who accordingly had a verdict.

(p) Thursday, 25 July 1779.

(q) Monday, 31 May 1779.

[† 7] *Infra*, M. 20 Geo. 3. p. 17.

Ewer. That the warranty might have been so worded as only to include able seamen (as if seamen had been opposed to landmen); but that, as expressed here, the contrast being with passengers, the whole of the crew or ship's company appeared to be meant. That this was the general maritime sense of the word.

Bearcroft, and *Lee*, argued in support of the rule for a new trial. They observed, that, although the *Solicitor General*, who had conducted the cause for the plaintiff, had not opened the stipulation in the policy expressly either as a warranty, or as a representation, but had insisted that it had been complied with, his lordship had assumed it to be a warranty; as they said it certainly was. That, being a warranty, the case of *Pawson v. Ewer* did not apply. That the sense of the word "*seamen*" is well understood, and the distinction between seamen and landmen or boys, as fully established as that between clergymen and laymen. That a seaman is only such a person as is liable to be pressed. As to the question, whether it was a total or an average loss, they cited the case of *Hamilton v. Mendez* (r) and contended, that the jury had never taken that point into their consideration.

LORD MANSFIELD.—The whole argument for the defendant turns upon begging the question. There is no doubt, but that this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable, if it were not complied with, because it is a condition on which the contract is founded. But the question is, whether, in this warranty, the word "*seamen*" was used in the strict literal sense or not. If it was, the warranty has not been complied with. It is a matter of construction. Boys are reckoned seamen, not only at the custom-house, and *Greenwich* hospital, but in the distribution of prizes. I think the parties were not sanguine at the trial. The special jury, and the bye-standers, were perfectly clear. They hardly seemed to think it a serious question in this case. There is scarcely now such a thing as a ship entirely manned with seamen strictly so called. Even on board the King's ships, they are satisfied with a few strict seamen, and able-bodied landmen make up the rest of the crew. I had no doubt of the sense of the word in this policy, and the jury decided it. With regard to the other question, it was stated as a forlorn hope; but certainly, when the action was brought, there was no prospect of a recapture of the ship; she was considered as totally lost in a remote part of the world. The report which afterwards prevailed of her being retaken, some months after the capture, was loose and general;—

1778.

BEAN
against
STUPART.

[14]

(r) *B. R. T.* 1 G. 3. 2 *Burr*, 1198.

1778.

no circumstances known, no account of her situation, nor of what part of the cargo might be saved. In short there is no doubt, but that it was a case where the owner might abandon. The rule discharged.

[15]

LAYTON *against* PEARCE.

Under an agreement to perform one of two things, the option is, in the person who is to perform.—If one of the two things is prohibited under a penalty, no action will lie for the penalty, until the party makes his election by performing the prohibited part of the contract.

BY the Lottery act of 1777, (17 Geo. 3. c. 46.) a penalty of 500*l.* was given to be recovered in a *quidam* action against any person—"Who should receive any money whatsoever in consideration of repayment of any sum or sums of money, in case any ticket or tickets in the said lottery should prove fortunate, or in case of any chance or event relating to the drawing of any ticket or tickets in the said lottery, either as to the time of such ticket or ticket being drawn, or whether such ticket or tickets should be drawn fortunate or unfortunate."—This was an action upon that statute, against a lottery-office keeper. The declaration contained three counts.—The first stated that the defendant had received 1*l.* 6*s.* from one Robert Griffin, in consideration of repaying the value of an undrawn ticket, if the above number should be drawn on the ensuing day.—The second, that he had for the like sum, and in the like event, undertaken to deliver an undrawn ticket.—The third only differed from the first, in stating the stipulation to have been to pay a precise sum (of 20*l.*) on the like event, and in following more accurately the words of the statute.—The agreement proved at the trial was in the alternative, *viz.* that Griffin had paid to the defendant 1*l.* 6*s.* on condition that if the ticket No. 37,733 in the lottery then drawing, should come up, either a blank or prize on the ensuing day, he (the defendant) would either deliver to Griffin an undrawn ticket, or pay him 20*l.* He had not in fact done the one thing or the other. The cause was tried before Lord MANSFIELD, at Guildhall, and, a verdict having been found for the plaintiff, Dunning moved for a rule to shew cause why it should not be set aside, and a nonsuit entered:—1. Because the agreement proved, did not correspond with that stated in any one of the three counts in the declaration:—2. Because the agreement as proved would not maintain the action, for that, being optional, it was not within the provisions of the statute.

The rule was granted, and the *Solicitor General*, and Lane, shewed cause.—They said, that the plaintiff, by bringing this action, had made his election [5], and had converted

[5] The plaintiff here was a third person, and not the insured. Griffin indeed was the witness who proved the transaction at the trial, but it would

have been a violent presumption indeed, to have considered that as a constructive election.

converted the contract into an absolute agreement for the payment of money.

* *Dunning*, and *Davenport*, on the other side.—They observed that this, being a penal statute, was *stricti juris*, and that the plaintiff, by not stating the contract for the record exactly as the fact was, had deprived the defendant of the means of bringing its legality before another court by a writ of error.

Upon a question from the court, the *Solicitor General* said, that, by the general practice, the option in such transactions was in the insured.

The court took some days to consider.

Lord MANSFIELD,—We are of opinion that, if the option had been in the insured, and if he had made his election to take the 20*l.* the contract would have been sufficiently stated, because he would thereby have converted the agreement into an absolute contract for the payment of money, and then the other part of the alternative in the original bargain would become surplusage. In an action on the statute of 2 *Geo.* 2. c. 24. against bribery, the act of bribery laid, was the corrupting a voter to give his vote for *Mr. Lockyer and the Earl of Egmont*, and the evidence was, that the contract was to vote for *Mr. Lockyer and his friend*. The court held, that, by that part of the transaction by which the voter was corrupted to vote for *Mr. Lockyer*, the offence was complete, and that the rest was surplusage, and needed not to be proved (*s*). But, though the practice may be, that the insured shall have the option, in point of law, the person who is to perform one of two things in the alternative has the right to elect. This has been established by a variety of cases. The present action, therefore, cannot be supported [6].

Judgment of nonsuit.

1778.

LAYTON
against
PEARCE.

* [16]

(*s*) *Combe v. Pitt*, M. 5 *Geo.* B. R. Burr. 1586. But *vide* *Brislow v.*

Fright, *infra*, E. 21 *Geo.* 3. p. 640.

[6] *Churchill v. Wilkins*, B. R. M.

7 *Geo.* 3. 1 *Term Rep.* 447. On the

argument of that case at the bar, the

accuracy of this report of *Layton v.*

Pearce seemed to be questioned; but,

besides other proofs I could mention

its correctness, I have had an op-

portunity of comparing it, with a note

taken at the time, by the late Sir Tho-

mas *Davenport*, with which it exactly corresponds.

[6] Part of *Dunning's* rule was for a new trial, on the ground, that, according to the weight of evidence given at *Nisi Prius*, the office was not kept by the defendant, but another person. But the discussion of that part of the case became unnecessary, by the opinion delivered by the court on the other point.

WOOLDRIDGE *against* BOYDELL.

If a ship insured for one voyage, sails upon another, though she be taken before the dividing point of the two voyages, the policy is discharged.

* [17]

THE ship *Molly* being insured "At and from *Maryland* to *Cadiz*," was taken in *Chesapeak Bay*, in the way to *Europe*. Upon this, the insured brought this action against the * defendant, one of the underwriters on the policy. The trial came on at *Guildhall*, before Lord MANSFIELD, when a verdict was found for the defendant, and, a new trial being moved for, the material facts of the case appeared to be as follow:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the enumerated goods were to be landed in *Britain*; and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were "to *Falmouth* and a *Market*." And there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken, was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—At the trial, Lord MANSFIELD told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff.—If, on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant.

The *Solicitor General*, *Dunning*, and *Davenport*, argued for the new trial.—They contended that this was like the cases of an intention to deviate where the capture had taken place before the deviation was carried into execution and they cited, *Foster v. Wilmer* (1), *Carter v. The Royal Exchange Assurance Company*, cited in *Foster v. Wilmer*, and *Rogers v. Rogers*, a very late case in this court.—They besides, urged, that, by "a *Market*" in the bills of lading and in the instructions to the broker (where that expression was used, but which I believe had not been read at the trial), was meant *Cadiz*.—And that "to *Falmouth* and a *Market*" might be considered as meaning to the market at *Cadiz*, first touching at *Falmouth*.—(It appeared in evidence at the trial, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have exceeded greatly what was paid in this case.)

Lee, and *Baldwin*, shewed cause.—They argued, that here there had been no inception of the voyage insured, and therefore the case was very different from those cited by the counsel for the plaintiff.

(1) *H. 19 G. 2. 2 Strange 1249.*

1778.

WOOL-
DRIDGE
against
BOYDELL.
* [18]

LORD MANSFIELD,—The policy, on the face of it, is from *Maryland to Cadiz*, and therefore purports to be a direct voyage to * *Cadiz*. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured, arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a Market, some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. “*A market*” is not synonymous to “*Cadiz*”; that expression might have meant *Leghorn*, *Naples*, *England*, &c. No man, upon the instructions, would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff, but it does not apply here. This is a question of fact. There cannot be a deviation from what never existed. The weight of evidence is, that the voyage was never designed for *Cadiz*.

The rule discharged.

STUART *against* WILKINS.

THE two first counts in the declaration in this case were as follow:—“*David Stuart* complains of *James Wilkins* being, &c. For that whereas the said *James*, on the first day of *February*, in the year of our Lord 1778, at *Hatfield*, in the county of *Hertford*, offered to sell to the said *David*, a certain mare of him the said *James*, and whereupon afterwards, to wit, on the day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid,

Assumpsit is a proper form of action, where there has been an express warranty.

1778.

STUART
against
WILKINS.

said, in consideration that the said *David*, at the special instance and request of the said *James*, would buy of him the said *James*, the said mare, at and for a certain large price or sum, to wit, the price or sum of 31*l.* 10*s.* of lawful money of *Great Britain*, to be paid by the said *David*, to the said *James*, when he the said *David* should be thereunto afterwards requested; he the said *James* undertook, and then and there faithfully promised the said *David*, that the said mare was sound, and the said *David* in fact faith, that he, confiding in the said promise and undertaking of the said *James*, so by him made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, at the special instance and request of the said *James*, did buy of the said *James* the said mare, at and for the said price or sum of 31*l.* 10*s.* and did then and there pay to the said *James* the sum of 25*l.* 5*s.* part of the said sum of 31*l.* 10*s.* and did then and there undertake and faithfully promise the said *James* to pay him the further sum of 6*l.* 5*s.* residue of the said sum of 31*l.* 10*s.* when he the said *David* should be thereunto afterwards requested. Yet the said *James*, not regarding his said promise and undertaking so by him made as aforesaid, but contriving, and fraudulently intending to injure the said *David* in this behalf, did not regard his said promise and undertaking so by him made as aforesaid, but craftily and subtilly deceived the said *David* in this, that the said mare, at the time of the making the said promise and undertaking of the said *James*, was not sound, but, on the contrary thereof, was unsound, and was afflicted with a certain malady or disease, called the windgalls, to wit, at *Hatfield* aforesaid, in the county aforesaid; whereby the said mare then and there became, and is of no use or value to the said *David*.—And whereas also the said *James*, afterwards, to wit, the same day and year aforesaid, at *Hatfield* aforesaid, in the county aforesaid, in consideration that the said *David*, at the like instance and request of the said *James*, bought of him the said *James*, a certain other mare of him the said *James*, at and for a certain other large price or sum, to wit, the sum of 31*l.* 10*s.* of like lawful money, and had then and there paid to the said *James*, the sum of 25*l.* 5*s.* in part of the said last mentioned sum of 31*l.* 10*s.* and had then and there undertaken and promised to pay to the said *James* the further sum of 6*l.* 5*s.* residue of the said last mentioned sum of 31*l.* 10*s.* when he the said *David* should be thereunto afterwards requested, he the said *James* undertook, and then and there faithfully promised him the said *David*, that the said last mentioned mare was sound.—Yet the said *James*, not regarding his said promise

mentioned promise and undertaking so by him made as last aforesaid, but contriving and fraudulently intending to injure the said *David* in this behalf, did not regard his said promise and undertaking so by him made as last aforesaid, but craftily and subtilly deceived the said *David* in this, that the said last mentioned mare, at the time of the making the said last mentioned promise and undertaking of the said *James*, was not sound, but then was unsound, whereby the said last mentioned mare became, and is of no use or value to the said *David*."—To these were added a count for money laid out and expended, and another for money had and received.—The cause was tried at the assizes at *Hertford*, before Lord MANSFIELD, and a verdict found for the plaintiff; but the evidence being given of an *express* warranty, and a doubt being raised, whether, in such a case, this was a proper form of action, the verdict was taken subject to the opinion of the court on that question.

Upon the motion for setting aside the verdict, and entering a nonsuit, Lord MANSFIELD said, that it had been suggested, that the form of this declaration arose from a determination of his at the same place about twenty years ago, but that, he said, was a case of a clear fraud, and was declared on as a fraud.

Cause was now shewn against making the rule absolute.

Kempe, Serjeant, and *Morgan*, for the defendant, contended, that there are two sorts of warranty, 1. *express*, 2. *implied*.—That, in an *express* warranty, the party is liable without alleging notice; but that it must be laid *warrantizando vendidit*.—That every promise is executory, and refers to something to be done in future, whereas the declaration here charged the defendant with promising a thing past. They cited *Finch*. 180. *Dyer*. 75. pl. 23. *Bro. Abr. Tit. Action sur le case*, pl. 8. *Keilway*, 91. 2 *Ld. Raymond*, 1118. *Herne's Pleader*, 7, 77, 223. *Rastell*, 9. 1 *Ventr.* 365. *Alleyne* 91. *Salk.* 210. *Fitz. N. Br.* 98. a.

Lord MANSFIELD,—The declaration struck me as particular, in departing from the old rule of declaring expressly on the warranty. A warranty extends to all faults known and unknown to the seller. Selling for a sound price without warranty may be ground for an *assumpsit*, but, in such a case, it ought to be laid that the defendant knew of the unsoundness. I left it to the jury as on a warranty, subject to the opinion of the court, whether a nonsuit should not be entered. I am told by the learned Judges on my left hand (*ASHHURST*, and *BULLER*, *Justices*,) that this sort of declaration, where a warranty is to be proved, has been practised for twenty years, and that it is made use of with a view to let in both proofs, if necessary.

1778.

STUART
against
WILKINS.

[21]

1778.

STUART
against
WILKINS.

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1778.

STUART
against
WILKINS.

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1778.

STUART
against
WILKINS.

ASHHURST, *Justice*.—Whatever may have been the old form, I believe it has been long settled that this form of action is right; and, having been long established, I am of opinion that it ought to be supported. There may be cases where the count for money had and received may be of use to the plaintiff, and the warranty including a promise, may be declared on as such.

BULLER, *Justice*.—This mode has been in use ever since I have known any thing of practice, and my brother ASHHURST remembers it much longer. There is no objection to it, in point of form, which could prevail even on a special demurrer. Promises are not all executory. Do not all our books make a distinction between promises executed, and promises executory;—that in one you may traverse the consideration, in the other not? Because another action would lie, it does not follow that this will not. It was determined in *Slade's case*, that there may be different actions for the same injury (u).

The rule discharged.

(u) *T. 44 Eliz. 4 Co. 92. b.*

Monday, 15th
Nov.

KEECH, Lessee of WARNE, *against* HALL and Another.

A mortgagee may recover in ejectment (without giving notice to quit) against a tenant who claims under a lease from the mortgagor granted after the mortgage, without the privity of the mortgagee [C.]

EJECTMENT tried at *Guildhall*, before BULLER, *Justice*, and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cause shewn, the court took time to consider; and, now, Lord MANSFIELD stated the case, and gave the opinion of the court, as follows.

Lord MANSFIELD.—This is an ejectment brought for a warehouse in the city, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the court to decide, is, whether, by the agreement understood between mortgagors

[C.] But if there is tenant from year to year, and the landlord mortgages, pending the year, the tenant is entitled to 6 months' notice from the mortgagee. *Birch v. Wright*, 378. 380.

and

[+]
Buckn
73.

1778.

KEECH
against
HALL.

and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent: or whether he may not treat the defendant as a trespasser, disseisor, and wrong-doer. No case has been cited, where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the same circuit (*Belchier v. Collins*); but, there, the mortgagee was privy to the lease, and, afterwards, by a crafty trick, wanted to turn the tenant out. I do not wonder that such a case had not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity, goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent, is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow not the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action [† 8]; but here the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases [† 9]. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. If by implication, the mortgagor had such a power, it must go to a great extent;—to leases where a fine is taken on renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief, that there is no mortgage; for it is the nature of the transaction, that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should inquire after

[23]

[† 8] *Vide Weakly, Lessee of Yea, v.**Ducknell, B. R. M. 17 Geo. 3. Cowp.*[† 9] *Infra, Moss v. Gallimore, M.**20 Geo. 3. p. 266, 267.*

1778.

KEECH
against
HALL.

and examine the title deeds. In practice indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will [† 10]. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of *Littleton* is clear. We are all clearly of opinion that the plaintiff is entitled to judgment [7].

The *Solicitor General* for the defendant.—*Dunning*, and *Cowper*, for the plaintiff.

The rule discharged.

Monday, 16th
Nov.

WESTON against DOWNES.

Assumpsit, for
money had
and received,
will not lie,
when the pay-
ment has been

THIS was an action for money had and received by the defendant to the use of the plaintiff. On the trial, before Lord MANSFIELD, the plaintiff proved, that the defendant, in consideration of seventy guineas, had sold him made on a contract which is still open, and not given up by the defendant.

[† 10] It is expressly provided by 4 Ann. c. 16. § 10. "That no tenant shall be prejudiced or damaged by payment of any rent to a conusor or grantor of any manors or rents, or of the reversion or remainder of any messuages or lands, or by breach of any condition for non-payment of rent, before notice shall be given to him of the grant by the conusor or grantee."

[7] When the question was argued

at the bar, Lord Mansfield said, he entirely approved of what had been done by *Nares*, Justice, upon the *Oxford* circuit, and afterwards confirmed by this court, in the case of *White, lessee of Whatley, v. Hawkins*, viz. not to suffer a lessee under a lease prior to the mortgage to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action, that the mortgagee did not intend to turn him out of possession [† 11].

[† 11] *Law of Nt. Pr. Ed.* of 1775, p. 96.

a pair

1778.

WESTON
against
DOWNS.

a pair of coach horses, which he undertook to take back, if the plaintiff should disapprove of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant in their stead, without making any new agreement. These he also returned within a month, and received a third pair on the 23d of December, without any fresh bargain. This third pair he disapproved of, because they were restive, and would not draw; and offered to return them on the 5th of January, but the defendant refused to take them back.

Lord MANSFIELD directed a nonsuit; and, on a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, the question was, whether the action of *assumpsit* for money had and received, would lie in this case.

Dunning and *Davenport*, for the plaintiff, contended, that there was an end of the contract on the return of the first pair of horses, and that then a right accrued to bring this action.

The *Solicitor General*, for the defendant, insisted, that the contract was continued by taking other horses, and that the plaintiff ought to have declared upon the special agreement.

Lord MANSFIELD, — I am a great friend to the action for money had and received; and therefore I am not for stretching, lest I should endanger it [† 12]. Where there is a special contract, the defendant ought to have notice, by the declaration, that he is sued upon that contract [† 1].

WILLES, *Justice*, of the same opinion. — Here was originally a special contract, and it continued between the parties through all their subsequent dealings.

ASHHURST, *Justice*, — If the plaintiff had demanded the seventy guineas, and brought his action, on the return of the first pair of horses, and no second pair had been sent, this action would have lain [† 2]; but, here, the contract was continued, and the case resembles one that was tried before me on the Midland Circuit, and afterwards came on in this court; viz. *Power v. Wells*, E. 18 Geo. 3. [8].

BULLER,

[† 12] *Infra*, *Longchamp v. Kenny*, E. 19 Geo. 3. p. 132, 133.

[† 1] *Vide* *Fielder v. Starkin*, C. B. T. 28 Geo. 3. H. Bl. 17.

[† 2] *Towers v. Barrett*, B. R. H. 26 Geo. 3. 1 Term Rep. 133.

[8] In the case of *Power v. Wells*,

the plaintiff gave a horse of his own and twenty guineas for a horse of the defendant's, which was warranted sound, but proved to be unsound; upon which the plaintiff, after tendering a return as above mentioned, brought the action for money had and received for the

1778.

WESTON
against
DOWNES.
* [25]

BULLER, *Justice*.—This action will not lie, as the defendant has not precluded himself from entering into the nature of * the contract, by taking back the last pair of horses. Where the contract is open, it must be stated specially. In *Power v. Wells*, the defendant had warranted a horse to be sound, which proved unsound. The plaintiff tendered a return of the horse, but the defendant refused to receive him; and an action for money had and received being brought, it was held by the court, that it would not lie.

The rule made absolute.

Thursday,
19th Nov.

ROE, Lessee of Roach, Widow, *against* POPHAM and Others.

If a fine is levied by tenant for life, remainder-man in tail, and reversioner in fee, a declaration of uses by the tenant for life and remainder-man in tail, does not bind the reversioner, without his privity.—

When no uses are declared, parol evidence may rebut the resulting use to the conusor in favour of the conusee, without any written declaration of the uses in his favour.

BY marriage-articles, bearing date the 28th of February, 1734, *Letitia Harris*, and *Posthuma* her daughter, the one being tenant for life, and the other entitled to a remainder in tail, of a trust estate, in contemplation of a marriage about to be celebrated between *Posthuma Harris* and *William Taylor*, covenanted to levy a fine, and to settle the lands in question to trustees, in strict settlement, with a remainder in fee to *Posthuma*. The legal estate of the whole, and the equitable estate in the reversion in fee, expectant on *Posthuma's* estate tail, had descended to *Thomas Harris*, eldest son of *Letitia's* husband by a former wife. He was not a party to the articles of 1734. But, in 1735, a fine was levied, in which *William Taylor*, *Thomas Harris*, *Letitia* and *Posthuma*, were conusors, and the trustees in the marriage-settlement conusees. *Thomas Harris* died without issue, in 1736, without having joined in any declaration of the uses of the fine, and was succeeded by his full sister *Elizabeth*, the lessor of the plaintiff, who was his heir at law, and the heir at law of her father as to the reversion. *Posthuma* had two daughters, but she died in 1739; one of her daughters in the same year, and the other in 1740, both without issue; and *Letitia* died in 1771. This ejectment was now brought by *Elizabeth* against the trustees, on the ground that the declaration of uses in the marriage-articles did not operate against *Thomas Harris*, he not being a party to them; and that where there is no declaration of the uses of a fine (which by the statute of frauds (v) must be in

the twenty guineas, and also an action of *trover* for his own horse. The court held, that neither would lie. Not the latter action, because the property had been changed [† 13]. (v) 29 Car. 2. c. 3. § 7.

[† 13] Since reported, *Cowp.* 818.

writing

writing) they result to the conufors. BULLER, *Justice*, before whom the caufe was tried, at the laft fummer fize for *Somerfetfbire*; being of that opinion, * directed a verdict to be found for the plaintiff, but with leave to move for a new trial without payment of cofts.

At the trial, the counfel for the leffor of the plaintiff had objected to the reading of the marriage-articles, becaufe the reverfioner, under whom fhe claimed, was not a party to them, and there was no evidence of his knowing that there were fuch articles: but the judge over-ruled this objection, as they made a neceffary part of the defendant's title, and it was clear, that it was no objection againft reading a title-deed, that the perfon againft whom it was produced, was not a party to it.

Morris now contended, for the defendant, that the claufe in the ftatute of frauds, requiring that declarations of trusts and confidences (and which is held to include fines,) fhould be made by fome writing figned by the party, extends, in the cafe of fines, to third perfons only, and not to the conufors and conufees of the fine. That the resulting ufe to the conufors may be rebutted in favour of the conufees, by parol evidence, fhewing fuch to have been the intention of the parties. That this doctrine is fully eftablifhed by the cafe of Lord *Altham v. the Earl of Anglesea* (w). That it being a mere queftion of fact and intention, in whom the ufes of the fine in the prefent cafe refted, that queftion ought to have been left to the jury, and that there could be no purpofe imagined for levying the fine, and making the trustees conufees, except to confirm the marriage-articles.

GOULD for the plaintiff.—He cited *Beckwith's Cafe* (x).

LORD MANSFIELD,—The cafe cited by Mr. *Morris* is good law. There, there was evidence to rebut the resulting ufe; but here I fee no proof of intention on the part of the reverfioner in fee. He was not a party to the marriage-articles. If he had been, *that* would have been strong evidence againft any resulting ufe to him. The form of a fine is to give a title to the conufee; but, in truth, it is for the convenience of the conufor; and, from the constant uſage, the prefumption is, that it is levied to his ufe. This indeed is liable, like all other prefumptions, to be encountered by contrary evidence; but here the reverfioner in fee has done nothing to rebut the prefumption.

The rule difcharged.

(w) *E. 8 Ann. Gilb. Rep.* 16.
got on *Rec. S. C.*

(x) *2 Co. 58. b.*

1778.

ROB
againſt
POPHAM.

* [26]

1778.

Tuesday,
17th of Nov.STEVENS *against* CARRINGTON.

On a dissolution of a partnership, by a covenant that the plaintiff shall have the moiety of goods in a warehouse, which is to be the defendant's, the defendant is not bound to deliver the goods.

IN an action of debt, upon a bond, conditioned for the performance of the covenants in a deed to dissolve a partnership between the plaintiff and the defendant as wharfingers, the defendant having prayed oyer of the condition, one of the covenants appeared to be, in effect, "That the said parties agreed with each other, "that the goods and merchandises which should be "lying upon rent, on all, or any part of the partner- "ship premises at the time of the dissolution of the part- "nership, should be divided equally between them; and "that each should bear and pay a moiety of the charges "and expences attending the weighing and dividing the "same; but that the plaintiff should solely bear and pay "the charges and expences attending the conveying his "moiety from a warehouse agreed to be assigned to the "defendant, to another warehouse agreed to be assigned "to the plaintiff."—He then pleaded performance of all the covenants.—The plaintiff replied, that he had performed, or was willing to perform, his part of the above-mentioned covenant, and that although he had required the defendant to *deliver* him his said moiety of the goods and merchandise, &c. yet the defendant did not, nor would deliver, or cause to be delivered, to the plaintiff his said moiety, but wholly refused, &c.—To this replication the defendant demurred generally.

Baldwin, in support of the demurrer, insisted, that, in actions founded on covenants, the words must be strictly followed; that there was, in this case, no stipulation to deliver the goods. That the defendant did not mean to put himself to the expence of the delivery; that, being a wharfinger, it might not be in his power to deliver them, because some other person or persons might have a controul over them.

Runnington, for the plaintiff, admitted, that there was no express covenant to deliver; but contended, that such a covenant arose by necessary implication of law, from the words of the deed. The plaintiff, he said, could not enter the warehouse in which the goods were, without the consent of the defendant; it being assigned to him. He cited *Robinson v. Amps* or *Aunts* (y), and *Hill v. Carr* (z).

Lord MANSFIELD told *Baldwin*, he had no occasion to reply; and said, that the defendant, by this covenant,

(y) *Sir Tho. Raym.* 25. 1. *Sid.* 48.(z) *Chancery Cases*, 294.

was not bound to deliver; though if he had obstructed the plaintiff in removing the goods, it would have been breach of the covenant.

Runnington moved for leave to amend, which was granted.

1778.

STEVENS
against
CARRING-
TON.

The Earl of AILESBUURY against Pattison.

Friday,
20th of Nov.

THIS was an action of debt against the defendant, to recover six penalties, on the statute of *Ann. c. 4.* for keeping a gun to destroy game; for using a gun for that purpose; for keeping a setting dog; for using a setting dog; for exposing a grouse to sale; and for exposing a partridge to sale; not being qualified. The cause was tried, at the last assizes at *York*, before *WILLES, Justice*, and a verdict found for the plaintiff on one of the counts, subject to the opinion of the court, on the following case, *viz.* "That *William Marwood, Esq.* was lord and chief bailiff of the liberty, wapentake, or hundred, of *Langbaourgh*, in the *North Riding* of the county of *York*. That the said *William Marwood* and his servants, and the servants of those under whom he claimed, had used to kill game on the manor of *Whorleton*, which is within the said wapentake, and also on all the rest of the said wapentake. That the plaintiff was lord of the said manor of *Whorleton*, and had usually appointed a game-keeper within the said manor, for the purpose of preserving the game, and had a game-keeper at the time of the facts committed as laid in the declaration. That the said *William Marwood*, as lord and chief bailiff of the said wapentake, on the 21st day of *July 1777*, granted a deputation to the defendant (his menial servant), who was killing game at the time in the declaration mentioned, and did kill one grouse within the said manor of *Whorleton* for the said *William Marwood*, by his order, and for his immediate use; which deputation was in the words following, *viz.*—"I *William Marwood, Esq.* lord and chief bailiff of the liberty, wapentake, or hundred of *Langbaourgh*, in the *North Riding* of the county of *York*, do hereby nominate, authorize, and appoint, my servant *Michael Pattison*, to be my game-keeper of and within my said liberty, wapentake, or hundred of *Langbaourgh*, during my pleasure only, with full power, licence, and authority, to kill any hare, pheasant, partridge, or any other game whatsoever, in and upon all and every or any part of my said liberty, wapentake or hundred, of *Langbaourgh*, for my

A lord of a hundred, or wapentake, cannot grant a deputation to a game-keeper.

1778. my sole and immediate use and benefit, and, also, to take and seize all such guns, bows, greyhounds, setting dogs, lurchers, or other dogs intended for killing of hares, ferrets, tramels, lowbells, hays, or other nets, harepipes, snares, or other engines intended for the taking and killing of conies, hares, pheasants, partridges, or other game, as within the precincts of my said liberty, wapentake, or hundred of *Langbaurgh*, shall be used by any person or persons, who, by law, are prohibited to keep or use the same. Given under my hand and seal this 21st day of *July*, 1777.—That the said deputation was duly registered with the clerk of the peace. That the said *William Marwood* had granted no deputation before that given to the defendants.”

The Earl of
AILESBUARY
against
PATTISON.

The question for the opinion of the court, upon the foregoing case, was, “Whether the defendant had any right or authority to kill game upon the manor of *Whorleton*?”

Davenport, for the plaintiff, besides drawing many arguments from the nature of wapentakes and hundreds, and the ancient statutes concerning them, contended, that the statutes authorising the appointment of game-keepers, do not extend to the lords of a wapentake or hundred. That the words of 22 & 23 Car. 2. c. 25. are, “That all lords of *manors or other royalties*, not under the degree of an esquire, may, by writing under their hands and seals, authorise one or more game-keeper or game-keepers within their respective manors or *royalties*” (a). That it then gives the game-keepers, so appointed, authority to seize such guns, bows, &c. as, within the precincts of *such respective manors*, shall be used by persons not qualified. That the words “*royalty*” was not repeated in the last part of the clause, which shewed that it was used as synonymous to manor. That, by the statutes of 5 Ann. c. 14. 9 Ann. c. 25. and 3 Geo. 1. c. 11. which use the words “*lords and ladies of manors*,” without any other description, it was manifest that *they* only were meant by the legislature to have the power of granting deputations. That honours, baronies, seigniories, and fees, are words applied, in different parts of *England*, to the same sort of property as manors, one of them generally comprehending several or many manors. But that the lord of a wapentake or hundred was to be considered only as lord of the hundred court, or court-leet. That it would not be argued that a sheriff could grant such a deputation for his county; and, if not, how could a lord of a hundred or wapentake, which is only part of the county, and

(a) § 2.

taken out of it? That if this deputation were sustained, there would be two game-keepers in the same manor; for that Lord *Ailesbury* had appointed one, which he certainly had a right to do; but that, by 9 *Ann. c. 25.* only one game-keeper could be appointed within any one manor. That as to the usage stated in the case, that might be evidence of a prescriptive free warrant, so as to excuse a trespass, but it could not enable Mr. *Marwood* to depute another to kill game.

1778.

The Earl of
AILESBUURY
against
PATTISON.

Chambre, for the defendant, argued, that the question depended upon the construction of 22 & 23 *Car. 2. c. 25.* and of 5 *Ann. c. 14.* That all wapentakes were originally in the crown, and must be derived from it, and that courts are incident to them, as to manors. 2 *Roll. Abr. 73.* That they therefore are properly royalties, and that, in the statute of 14 *Ed. 3. c. 39.* the owners of wapentakes are called lords; so that Mr. *Harwood* was rightly styled the lord of this wapentake. That *Davenport* had said, that "royalty" in the statute of *Car. 2.* was synonymous to "manor," but that the words were "manors, or other royalties." That nothing could be inferred from the omission of the word "royalty" in the statute of 5 *Ann.* That acts *in pari materia* are to be explained by one another, and that act must be understood to extend to all who are entitled to appoint game-keepers by the statute of *Car. 2.*

LORD MANSFIELD,—All acts *in pari materia* are to be taken together, as if they were one law. In the statute of *Car. 2.* the words, "other royalties," are used, but that must mean royalties of the same nature with manors. If royalties of a higher nature had been meant, the statute would have begun with them. The reason why this word was used in the act of *Car. 2.* was, because such royalties go by different names in different parts of the kingdom; as honours, baronies, fees, &c. But in the act of 5 *Ann. c. 14.* the words are only "lordship or manor" (b), and the acts of 9 *Ann.* and 3 *Geo. 1.* recite the others, and only mention "lords and ladies of manors."

The *possession* to be delivered to the plaintiff.

(b) § 4.

1778.

Friday,
20th of Nov.BRADY, Lessee of NORRIS, *against* CUBITT.

An implied revocation of a will by a subsequent marriage, and the birth of a child, may be rebutted by parol evidence.—If a will is revoked by implication, a reference to it, in an instrument attested according to 29 Car. 2. c. 3. amounts to a republication.

IN an action of ejectment, tried on the last *Norfolk* circuit, the jury found a special verdict to the following effect, *viz.* "That *John Norris* was seised in fee, *inter alia*, of the premises in the declaration mentioned.—That, on the 26th of *June* 1770, (being then a widower without children, and his sister *Anne Aufrere*, wife of *Anthony Aufrere*, being his heir at law), he made his will, in writing, duly attested, and thereby devised the said premises to *T. B. Bramston*, *B. D. G. Dillingham*, *T. G. Ewen*, and *T. Brograve*, and their heirs, to the use and intent that the chancellor, master, and scholars of the university of *Cambridge*, and their successors, should and might for ever have, receive and take thereout, and every or any part thereof, upon trust as therein after was mentioned, an annuity or yearly rent-charge of 120*l.* clear of all taxes, and other deductions whatever, with powers of entry and distress as between landlord and tenant; and that the testator declared, by his said will, the trusts of the said annuity or rent-charge in the following words, *viz.* "I do hereby declare my will and meaning to be, that the said chancellor, master, and scholars, and their successors, shall from time to time for ever stand and be seised and possessed of the said annuity or yearly rent-charge, and of the said powers and remedies for the recovery thereof, upon special trust and confidence, and to the intent that they shall, from time to time for ever, pay, apply and dispose of the same and every part thereof, to such person or persons, upon such trusts, &c. and in every respect in such manner as are expressed, &c. in the first twenty pages of a small book covered with marbled paper, wholly of my own hand-writing, and all the interlineations and erasements therein having been made by me; in the twentieth page of which book, there are in my own hand-writing, the words and figures following, *viz.* "All written with my own hand, and bearing date, *Bristol*, *Sept. 22*, 1768, containing twenty pages.—*John Norris*."—And also the words and figures following, *viz.* "This is the paper or book, to which my will, bearing date the 26th day of *June*, refers.—*John Norris*."—That subject to, or chargeable with, the said annuity, or yearly rent-charge, and the powers and remedies aforesaid, for the recovery thereof, the testator declared his will to be, that the trustees and their heirs should stand seised of the said premises, in trust for his own right heirs and assigns for

for ever.—That the testator, by his said will, gave to the said *T. G. Ewen* 1000 *l.* and also gave many other pecuniary and specific legacies to many other persons.—That by the said paper or book, to which the will refers, it is directed, &c. (here was set forth an account of the purposes to which the annuity given to the university was to be applied).—That, after making the said will, viz. in May 1773, the testator married *Charlotte Townshend*; previous to which marriage, and after making the will, he conveyed certain lands of the annual value of 1230 *l.* to trustees, for the purpose of securing to the said *Charlotte* a clear yearly sum of 800 *l.* in case there should be no son of the marriage, and 600 *l.* if there should be a son, by way of jointure, and in bar of dower, with remainder to himself in fee.—That the premises in the declaration mentioned, and so devised as aforesaid by the will, were not comprized in the last mentioned conveyance.—That, on the 13th of December 1775, the testator having then had no issue born of the said marriage, and his said sister being then his next heir at law, wrote and subscribed with his name a paper writing (set forth *in hac verba*, and intitled “ memorandum of my intention,”) in which, after mentioning, that, by the settlement, his wife (of whom he speaks in the highest terms of approbation) had 800 *l.* a year clear money, which his will, “ even if it were not prior, could not affect, and which, he said, it had nothing to do with,” declared a further intention in her favour as follows, “ My will is, (and if I live to express it in legal formality, it shall be a coercive will) that not only all her jewels shall become hers, but that she shall have her choice of half the plate when appraised, and of half my books. That, moreover, she shall have to the amount of 200 *l.* (besides the harpsichord which I wholly give her) in furniture, (according to her own choice of it, and besides, or over and above the 800 *l.* 1000 *l.* in cash, to be paid to her within one year from my decease, by my executors under my will.—In case I shall not live to procure this my will and intention to be according to legal prescription, I call upon you my dear sister to fulfil my designs, using too all your endeavours that none shall hinder you.—To the page on the other side, and to the page on this, I have set my name as above dated, *John Norris*.—My friend *J. Ewen* take a copy of this, and if not complied with, publish it.”—That afterwards, on the 25th of October 1776, the testator had issue, born of his said wife, *Charlotte Laura Norris*, the lessor of the plaintiff; and that, on the 27th of December 1776, being seized as aforesaid of the premises in the declaration mentioned, amongst other real estates, he subscribed his name to another paper writing, in the presence of three witnesses,

1778.

BRADY
against
CUMMIS.

[33]

1778.

BRADY
against
GUBITT.

nesses, who, at his request, subscribed their names thereto in his presence, and in the presence of each other; which paper writing was dictated by him, and reduced into writing by his order, and was in the words and figures following, viz. "*Memorandum of what Mr. Norris said in the presence of Mr. Bromfield, J. G. Ewen and T. Lunt, on the evening of the 27th of December 1776. That, as his will was made before he married a second time, he had there devised his estate to his heir male, and had given 10,000 l. to the younger children of the Hoveton family; but now, having a female child, it is his meaning that she should inherit the estate as his heir, and of course that the 10,000 l. should not become due to the Hoveton children, unless the said child should die without heirs of her body. Mr. Norris also means that the 1000 l. left to Mr. J. G. Ewen should be paid to him, and also all the other legacies mentioned in the will to other people, except the above 10,000 l.—John Norris.—And he also particularly desires, that the college gift may be paid, and disposed, as he has, in the said will, directed.—The parchment book respecting the college gift is to stand.—Mr. Brograve had instructions for this, and drew it up.*"—Witness to the above signing of the said J. Norris, J. Bromfield, J. G. Ewen, T. Lunt.—That the said clause in the said paper writing last mentioned, immediately following the name of *John Norris, viz.—"And he also particularly desires, &c.* was, by the direction of the said *John Norris*, struck out, by several strokes of a pen drawn through the same, before the testator signed the said last-mentioned paper writing, the testator saying to the person who reduced the said memorandum into writing,—"*You may draw your pen through what you have now written, for there is a parchment book with the will in the hands of Mr. Brograve, that mentions all about it—That, by the words,—"children of the Hoveton family," and "Hoveton children," the testator meant the children of his said sister, who then lived at Hoveton.—That the will of the 26th of June 1770, did not contain any devise of any part of the testator's real estate to his heir male, or to any other person, except only the devise of the premises above-mentioned, part of his real estate, for securing the said rent-charge to the University of Cambridge. Nor did the said will contain any gift of 10,000 l. or any other sum of money to the Hoveton children, or any of them; but, in a draught of a will which had been prepared by the direction of the testator in the year 1768, but had never been executed, there was a devise of the principal part of his real estate to his said sister for life, with remainder to her first and other sons in tail-male, charged with the payment of 10,000 l. to the younger children of his said sister, on certain contingencies therein specified; and*

[34]

the said draft contained also a bequest, of 100 *l.* only, to the said *J. G. Ewen*.—That the testator died on the 5th of January 1777, seised in fee of the premises mentioned in the declaration, leaving the lessor of the plaintiff, his only child and heir at law; and that he also died seised in fee of other real estates of the yearly value of 2,500 *l.*—That after his death, and before the time within mentioned in which the trespass, &c.—The defendant claimed under the devise to the university.

Le Blanc, for the lessor of the plaintiff,—There are two questions upon this special verdict. 1. Whether the will of 1770 was revoked by the subsequent marriage, and birth of a child? 2. Whether, supposing it revoked, any thing appears on the face of the special verdict, which, in law, amounts to a republication, especially with respect to the devise to the university? 1. Before the statute of fraud, wills of land made under the particular customs of boroughs, or by virtue of the statute of wills (*c*), might be revoked by any express words without writing, the statute of wills giving power to any person seised in fee of lands, to devise such lands by will in writing, but being silent as to revocations; *Brook v. Warde* (*d*), *Symson v. Kirton* (*e*), *Cranvell v. Sanders* (*f*). But, besides these actual revocations, there were other acts of a testator which were considered as revocations, because contrary to, or inconsistent with, the will; as a devise in fee, and afterwards a lease for years, to the same person, to commence after the testator's death; *Coke v. Bullock* (*g*). And these constructive revocations were raised, even where the acts done were void in law; as feoffment without livery; bargain and sale without enrolment; a grant of a reversion without attornment; a devise to the poor of a parish, or to a corporation; *Mountague v. Jeoffereys* (*h*), *Rolle's Abr. Title Devise* (*i*). In the case of *Forse v. Hembling* (*k*), it was held, that a subsequent marriage revoked a will of land made by a feme sole. Now, in all these instances, the subsequent deed, devise, or marriage, could have no other effect, but to shew an alteration of intention; and, therefore, they prove, that any act indicative of such a change, was construed to be a revocation. The statute of frauds enacts, that all wills of lands shall be executed with certain solemnities (*l*). Then follows a clause prescribing similar solemnities in the case of revocations (*m*). But it is determined that this clause does not extend to implied revocations, or revocations in

1778.

BRADY
against
CUBITT.

[35]

(c) 32 H. 8. c. 1.

(d) *Dyer* 310.

(e) E. 4 Jac. 1. Cro. Jac. 115.

(f) M. 16 Jac. 1. Cro. Jac. 497.

(g) C. B. M. 2 Jac. 1. Cro. Jac. 49.

(h) *Moor* 429.

(i) p. 614.

(k) C. B. M. 30 El. 4 Co. 60. b.

(l) 29 Car. 2. c. 3. § 5.

(m) § 6.

1778.

BRADY
against
GUBITT.

[36]

in law; *Speke's Case* (n). *The Earl of Lincoln v. Rolls &c* (o), *Tickner v. Tickner* (p), *Eyre v. Eyre* (q), *Brown v. Thompson* (r), *Pollen v. Huband* (s). It is laid down in those cases, that a subsequent marriage and the birth of a child, is one of those changes of situation, that will amount to a revocation in law, of a will of land, as well as personal property. And this doctrine was recognized by your lordship in the case of *Wellington v. Wellington* (t). The same point came directly before the court of Exchequer, in a case of *Christopher v. Christopher*, which was decreed 6th of July 1771 (u); and it was there determined, by PARKER, Chief Baron, and SMYTHE, and ADAMS, Barons, against PERROT, Baron, that it was a revocation. The same question also occurred two years afterwards, in *Spraggs v. Stone*, at the Cockpit (v). The first will in that case was made in *Jamaica*, 6th of June 1764, by which the whole estate, real and personal, was devised to the defendant. The testator married in 1765, and had issue in 1766. Afterwards, on the 10th of October 1766, he made another will in *England*, which was in his own hand-writing, but not duly attested according to the statute of frauds; by which he devised his estate, real and personal, to his wife, in trust for his son. In August 1770, the chancellor of *Jamaica* decreed, that the marriage and birth of a child, and the second will, amounted to a revocation as to the personalty, but not as to the real estate. On the appeal to the privy council, PARKER, Chief Baron, DE GREY, Chief Justice, and Sir EARDLEY WILMOT, being present, "So much of the decree of the court of chancery in *Jamaica*, as established the will of 1764, with respect to the real estate, was reversed;" and it was declared, "that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the will of 1764." Their lordships, in this order of reversal, took no notice of the second will. 2. If the will of 1770, in the present case, was completely revoked by the marriage, and the birth of the daughter on the 25th of October 1776, has anything happened since, that can be construed to be a revocation? That cannot be without the solemnities required by the statute of frauds; *Gilbert's Law of Devises* (w), *Bunker v. Cooke* (x). The due execution of a codicil is not sufficient to republish a will. It was determined in *Lytton v. Lady Falkland*, and in *Penphraze v. Lord Landsdowne*.

(n) *Carth.* 81.(o) *In Dom. Proc.* 1695. 1 *Eq. Ca.*

412.

(p) Cited in 3 *Ark.* 742.(q) 1 *P. Wms.* 304. Note.(r) *T.* 1702. 1 *Eq. Ca.* 413.(s) *M.* 1712. 1. *Eq. Ca.* 412.(t) *B. R.* 8 G. 3. *Hill.* 4 *Burr.* 2169.(u) 5 *Burr.* 2171. Note. 2182.

Addend.

(v) 27 *March* 1773.

(w) 87. 95.

(x) *Fitz Gibb.* 225. *Gibb. Dru.* 17

both cited in *Comyns's Reports* (y). So, by cancelling a second will, one of a prior date is not revived; *Burtenshaw v. Gilbert* (z) [† 14]. The memorandum of the 27th of December 1776, is not found by the verdict to relate to the will of 1770. It refers to the devise to the testator's sister's children, which is contained in the former will of 1768, and not in the latter. That part of it, in which it is said to be his intention that the college gift shall stand, was not signed, and is scratched out. It may be contended that it is included under the words, "all the other legacies," and it will be said there is parol evidence of what the testator said, when the erasement was made. But the distinction is clear between a legacy and a devise, and no parol evidence should be received to explain the testator's intention contrary to the legal import of the language he has employed; *Strode v. Ruffel* (a), *Cole v. Rawlinson* (b), *Bortie v. Falkland* (c).

Graham, for the defendant,—I admit that implied revocations subsist as before the statute of frauds. But I am to contend 1. that there has been no revocation of the will of 1770. None of the cases have gone so far as to say that marriage, and the birth of a child, necessarily revoke a will. The doctrine is derived from the ecclesiastical courts, in *Lugg v. Lugg* (d), which was decreed by the delegates, marriage, and the birth of a child was declared to be merely a presumptive revocation. The will there was only of personal property. In the case of *Shepherd v. Shepherd* [10], which was sent out of chancery by Lord Camden for the opinion of Sir George Hay, it was determined, that the subsequent birth of children, even in the case of personalty, did not amount to a revocation. *Brown v. Thomson*, extended the rule to real property; but that case, as ultimately

1778.

BRADY
against
CURRIE.

(y) 383, 384.

(z) *B. R. E.* 4 *Geo. 3.* [† 14.](a) 2 *Vern.* 621. 624. *S. C.* with *Lytton v. Lady Falkland*.(b) *B. R. H.* 1 *Ann.* 1 *Salk.* 234.(c) *Canc. H.* 9 *W. 3.* 1 *Salk.* 231.(d) *E. 11 W. 3.* 1 *Ld. Raym.* 441. 2 *Salk.* 592.

[10] The following is the state of the facts in that case. "Shepherd the testator having made his will, after some small legacies to his collateral relations, made his wife residuary legatee. After the making of the will, his wife was brought to bed of a daughter in 1763, upon whose birth, the testator

added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300 *l. per ann.* should be secured on the *residuum*, and paid to his daughter. The codicil and will were found together. In 1765, another daughter was born, and in 1768, a son, who was a posthumous child, the testator being dead about six months before his birth."—Sir George Hay, in giving his opinion that the will was not revoked, delivered a very solemn and learned argument, in which he stated and examined a number of cases not in print, as well as those contained in the different reporters.

1778.

BRADY
against
CUBITT.

[38]

mately decided, proves that it does not hold universally, for there the will was established by Lord Keeper *Wright*, because the presumption was rebutted by other circumstances. In *Christopher v. Christopher*, there was a disposition of the whole estate, and the child, if the will had stood, would have been without any provision. *Spragge v. Stone* went entirely on the authority of *Christopher v. Christopher*, and, in the decree, it is called an implied revocation. Now, if this sort of revocation is only presumptive, it may certainly be encountered by evidence. *Serle v. Lord Barrington* (e). Such evidence has always been admitted in the ecclesiastical courts, as appears by Sir George Hay's judgment in *Shepherd v. Shepherd*. What are the facts in this case? A draught of a will in 1768, by which the testator devised his estate to his sister and her issue in tail, with 10,000 l. to her younger children. This was never executed. Then, in 1770, the will in favour of the university. And it is to be observed, that the devise to them is only of a very small part of the testator's estate—merely a farm. Then an ample settlement on his intended wife. Afterwards the marriage in 1773. Then, in 1775, the testamentary paper set forth in the special verdict. In October 1776, a child born; and, in December of the same year, the last paper attested by three witnesses. In that paper, the testator does, in some degree, confound the draught of 1768, with the will of 1770, and refers to both. He certainly refers to the latter, because he mentions the legacy of 100 l. to *Ewen*. But in the case of presumptions, parol evidence is undoubtedly admissible. And it appears that when he directed the additional clause relative to the college gift to be struck out, he spoke of the instrument of 1770, as his will. This rebuts every presumption that he meant to revoke it.—2. But, if the court were to hold, that the marriage, and birth of a child, did revoke the will of 1770, I contend, in the next place, that the paper of the 27th December 1776, refers to it with sufficient certainty to amount to a republication. To establish this position, I rely upon *Carleton Lessee of Griffin v. Griffin* (f), *Bond v. Seawell* (g), *Acherley v. Vernon* (h), cited in *Bond v. Seawell*, and *Molineux v. Molineux* (i).

Le Blanc, in reply, insisted on the cases of *Christopher v. Christopher*, and *Spragge v. Stone*, as having expressly established that a subsequent marriage, and birth of a child, amount to an absolute revocation. He said that the admission of parol evidence, or of any writing not executed with the solemnities prescribed by the statute of frauds, would

(e) M. 11 Geo. 1. 2 Ld. Raym. 1370.
8 Mod. 278. 2 Str. 826.

(f) E. 31 Geo. 2. 1 Burr. 549.

(g) M. 6 Geo. 3. 3 Burr. 1773.

(h) M. 10 Geo. 1. Camys 381.

(i) H. 2 Jac. 1. Cro. Jac. 144.

be of the most dangerous consequence, and would lead to all the inconveniences of perjury, which that act was calculated to prevent. That, in *Christopher v. Christopher*, the judges founded their opinions as to revocations by marriage and the birth of a child, on this, that those circumstances were matter of fact easily ascertained, and of such notoriety as not to occasion any danger of fraud or perjury, and that ADAMS, *Baron*, in that case, expressed a strong disapprobation of taking other extrinsic circumstances into consideration. And he contended, that the paper-writing of December 1776, did not refer with sufficient certainty to the will of 1770, for that to operate as a republication, and that a reference by a subsequent instrument, though properly attested, must be clear and unambiguous, in order to re-establish a will which has been revoked.

(*Dunning* mentioned to the court, that he had argued the case of *Spragge v. Stone*. That it was agitated at the bar, whether the statute of frauds extends to *Jamaica*; but that the judges thought it unnecessary to decide that question, and that the decree was penned as it is, merely that it might be seen abroad, that the privy council had not decided it [C].)

LORD MANSFIELD,—I had no doubt upon this case, from the beginning. "I have travelled a good deal through the question; I argued most of the cases when I was at the bar, relative to implied revocations of wills of personalty. Sir George Hay's decision is not applicable to the present question, because the point there was, whether the birth of a child alone, operated as a revocation. He held that it did not. And, in that case too, the child was totally unprovided for. A subsequent marriage, and the birth of a child, affords a mere presumption. There may be many circumstances where a revocation may be presumed. The case in *Cicero* is an old and well-known instance of such presumptions (k). But, upon my recollection, there is no case in which marriage and the birth of a child have been held to raise an implied revocation, where there has not been a disposition of the whole estate. It was a total disposition in *Christopher v. Christopher*, and in *Spragge v. Stone*; and it has always been a total disposition in the cases of personal property, because, by making an executor, the whole is disposed of. In such cases, the inference is excessively strong in favour of the wife and children. But I doubt

1778.

BRADY
against
CUBITT.

[39]

[C] By Stat. 25 Geo. 2. cap. 6. § 10. that act is made to extend "to such of the colonies and plantations, where the statute of frauds is by act of assembly made; or by usage, received as law." In 2 *P. Will.* 75. it is said to have been decided that the

statute of frauds does not bind *Barbadoes*.

(k) *Pater credens filium suum esse mortuum, alterum instituit heredem. Filio domo redeunte, hujus institutionis vis est nulla.* Cic. de Oratore.

1778.

BRADY
against
CUBITT.

doubt extremely (I give no opinion), whether the circumstances in this case are such as would raise the presumption. The testator disposes of a small part of his estate to a charity. Then, in contemplation of his marriage, he settles 800*l.* a year upon his intended wife, with remainder to himself in fee. It is clear, therefore, that he contemplated the change in his situation after the will, and provided for it as to his wife; and, with regard to the children, he may well be supposed to say, I will keep them in my own power. Suppose a man had given several legacies by a will, and had devised all his real estate to the use of his children when he should have any: would a subsequent marriage and the birth of a child have revoked a will of that sort?—But I am clear on the other ground, that this presumption, like all others, may be rebutted by every sort of evidence [† 15]. There is a technical phrase for it, in the case of executors: it is called rebutting an equity. *Lugg v. Lugg* is strong to this point. *Thomson v. Brown* was decided upon a particular, against a general, presumption; and Sir *George Hay* appears to have understood this to be the law. Now the intent here is glaring from the writings found by the verdict. Mr. *Le Blanc* admits that there is evidence to rebut the presumption. If that were more doubtful, I think Mr. *Graham* is right, that the instrument of the 27th of *December 1776*, sets up the devise to the university. This instrument was written after the birth of the child. The testator had ordered a draught of a will to be prepared in 1768. Afterwards, in 1770, he makes the will in question. Now what appears on this instrument of *December 1776*? The testator remembers the dispositions, both of 1768 and 1770; but is not correct as to which of them he had executed. But his meaning is, that his estate should go to his daughter.—That the 10,000*l.* should not be paid.—As to the legacy of 1000*l.* to *Ewen*, that was to stand.—“*And also all the other legacies.*”—The word “legacy,” in its ordinary signification, is applied to money, but it may signify a devise of land [†], and may here comprehend the devise to the university, which the testator calls a gift.

WILLES, *Justice*, of the same opinion.

ASHHURST, *Justice*.—I am of the same opinion. There was a strong case in this court, *E. 13 Geo. 3.* on the first point, as to the admission of parol evidence to rebut an equity, or implication. The cause had been tried before me.

BULLER, *Justice*.—I am of the same opinion. I argued the case alluded to by my brother ASHHURST. It was the case

[† 15] *Vide Skinn. 227.*[†] *S. P. Per Lord Macclesfield,**Beckley v. Newland, Canc. T. 1723.**2 P. W. 182, 186, 187.*

case of *Rogers v. Langfield*, and was decided on the authority of *Lake v. Lake* (k) before Lord Hardwicke. *Burtenshaw v. Gilbert* did not go upon an implied, but an express revocation, for the first will was in two parts, and the testator had cancelled one of them. In *Goodright, lessee of Glazier v. Glazier*, a will revoked by a subsequent will, but not cancelled, was held to be re-established by the cancellation of the subsequent will (l). Implied revocations must depend on the circumstances at the time of the testator's death.

1778.

BRADY
against
CURITT.

Judgment for the defendant [† 16].

(k) In *Canc.* 1751. 1 *Wils.* 313. *Goodright, lessee of Rolfe*, 3 *Wils.* 447. *Law of Ni. Pr. Ed.* 1775. p. 297. 2 *Blackst.* 937. and on error in *B. R.*
(l) *H. 10 Geo. 3.* 4 *Burr.* 2512. *T. 19 Geo. 3. Cowp.* 87. *Sutton v.*
[† 16] *Hide v. Mason*, 25. Nov. *Sutton, B. R. E.* 18 *Geo. 3. Cowp.*
1734. 8 *Vin.* 140. pl. 17. *Harwood v.* 812.

ACKWORTH against KEMPE.

THE goods of one *Wise* had been conveyed to *Ackworth* the plaintiff, by a bill of sale, and had actually been removed from the house of *Wise*. Two writs of *feri facias*, at the suit of different persons, against *Wise*, were delivered to the sheriff of *Suffex*, (the present defendant,) who granted warrants to his officer to execute them. The officer, in consequence of the warrants, took the goods above mentioned in execution, and sold them. Upon this, *Ackworth* brought an action of trespass *vi et armis* against the sheriff, (without joining the officer as a defendant.) The cause was tried before EYRE, Baron, at *Horsbam* summer assizes, 1778. The defence was, that the bill of sale to the plaintiff was voluntary and fraudulent. Both the writs of *feri facias* were produced, and a copy of the judgment on which one of them had issued. The copy of the other judgment could not be read, because the witness, who was to have proved it, was interested. On the part of the plaintiff, strong evidence was produced to shew that the bill of sale was fair, and that a valuable consideration had been given for it. The judge directed the jury to find for the plaintiff (at all events, and whatever they might think of the bill of sale) as to the goods taken under the writ, in the case where the judgment on which it issued had not been proved; being of opinion that the writ itself is not sufficient evidence, unless where the action is brought by the person against whom the *feri facias* had issued. The jury thought that the fairness and consideration of the bill of sale were proved, and they accordingly found a verdict for the plaintiff.

If on a *fi. fa.* against A. a bailiff takes the goods of B. trespass lies against the sheriff.

[41]

1778;
 ACKWORTH
 against
 KEMPE.

plaintiff, with damages to the amount of the sum for which all the goods had been sold under the executions. The plaintiff had produced evidence to shew that the real value was much greater, and equal to what appeared on the bill of sale. The defendant, on the contrary, had insisted, that, if the jury should think the plaintiff intitled to recover, they ought to deduct, from the sum for which the goods had been sold, the sheriff's poundage, and the other expences of the executions. (This was on the ground, that the parties at whose suit the goods were taken, were the real defendants, they having indemnified the sheriff.)

A new trial was moved for, on four grounds, viz. 1. That the verdict was contrary to evidence, the bill of sale being voluntary and fraudulent. 2. That there had been a misdirection on the point of evidence. 3. That the damages were excessive, the deductions contended for not having been made. 4. That the action would not lie against the sheriff, because his warrants being to take the goods of *Wise*, he had given no authority to his officer to take those of any other person, and, therefore, was not answerable, if goods which did not belong to *Wise* had been taken.

[42] *Kempe*, Serjeant, *Robinson*, and *G. Wilson*, for the plaintiff —

Dunning, and *Morgan*, for the defendant.

On the day when cause was shewn, the court was clearly against granting a new trial on any of the three first grounds. Lord MANSFIELD said, he had not the least doubt, from the evidence stated in the learned Judge's report, that the bill of sale was fair; which, he said, laid the question on the supposed misdirection out of the case. BULLER, *Justice*, recognized the distinction made by EYRE, *Baron*, on that question, and said, it was founded on the authority of a case in Lord *Raymond* (*m*).—With regard to the objection to the action, the court took time to consider; Lord MANSFIELD observing, that, if trespass would not lie, no other action would, and that the point was, therefore, of very extensive consequence.

Some days afterwards Lord MANSFIELD delivered the judgment of the court, to the following effect:

Lord MANSFIELD,—The only question now remaining is, whether trespass *vi et armis* can be maintained against a sheriff

(*m*) *Lake v. Billers*. 1 *Ld. Raym.* *Savage qui tam v. Smith*, C. B. T. 733. *Law of N. Pr.* 91. edit. 1775. 16 *Geo.* 3. 2 *Blackst.* 1104. [† 18]
Vide the same doctrine recognized in

[† 18] *Vide* also *Martin v. Podger*, B. R. 2 *Blackst.* 701. 5 *Burr.* 2631.

a sheriff for goods taken in execution by his bailiff, which turn out not to have been the goods of the person against whom the *feri facias* issued. On the part of the defendant it has been argued rather on authorities than on principle. The authorities cited were 2 *Rolle's Abr.* 552. *title Trespass*, pl. 9, 10. and *Saunderson v. Baker et al.* in C. B. T. 12. Geo. 3. (n). The passage in *Rolle's Abridgment* does not warrant the objection. The case there, when rightly understood, will appear to be a particular exception to the general rule; and the true inference from it is, that, where there is no exception, the sheriff is liable. The bailiff of a franchise is not the officer of the sheriff. [C 1] He gives no security. It is evident from pl. 5. in the same page, that this was *Rolle's* meaning. He there states, that, if a sheriff take one man for another, false imprisonment lies against him; and, although he says, "if a sheriff take, &c." he means his bailiff; for sheriffs never did execute process in person [† 17]. For all civil purposes the act of the sheriff's bailiff is the act of the sheriff. [C 2] If there could be any doubt, it is cleared up by the very case in the Common Pleas, which has been cited for the defendant. It was said, at the bar, that that case was determined on the ground of *recognition* [11] by the sheriff, and that the court was equally divided. The printed account of the case shews the danger of inaccurate reports [12]. I have a very correct report of it from Mr. Justice BLACKSTONE's own notes; which I will read. (Here his Lordship read the case exactly as it has been since printed (o).) In short, the point appears to be extremely clear; and it was not fair to puzzle us so long with it, as it seems the objection was suggested to Mr. Serjeant Glynn, who led for the defendant at the trial, and he would not take it, thinking there was nothing in it.

1778.

ACKWORTH
against
KEMPE.

[43]

The rule discharged.

(n) 3 *Wils.* 309. 2 *Blackst.* 832.[C 1] *Boothman v. the Earl of Surrey*, B. R. T. 28 Geo. 3. 2 *Term Rep.* 5.[† 17] *Vide Backwell v. Hunt, Noy* 107.[C 2] *Woodgate v. Knatchbull*, B. R. M. 28 Geo. 3. 2 *Term Rep.* 148. 150. 154.[11] The recognition in that case was only by the *under-sheriff*. How could that alter the question? It is mentioned as decisive by all the three judges who delivered their opinions on the motion for a new trial. Yet it seems that such a recognition could only make it the act of the *under-she-*

riff. If the act of the bailiff is not the act of the high-sheriff, neither is the act of the under-sheriff.

[12] The account of the case, in *Wilson*, agrees pretty nearly with Mr. Justice BLACKSTONE's report. It is much fuller; though not quite so accurate in distinguishing what the judges say on the point of the recognition, from what they say on the general question. [C] The determination is stated, to have been on the ground of the recognition, in the argument at the bar, in the case of *Badkin v. Powell*, B. R. M. 17 Geo. 3. *Cowp.* 476, 477. (o) 2 *Black.* 832.

Tuesday,
24th Nov.

HURD, against FLETCHER and another, Executors of Sir JOHN ASTLEY, Bart.

A fine being levied of a feme covert's estate, with a joint power to the husband and wife to declare the uses; and the uses being declared by the husband and wife in remainder to A: If the husband make a lease and covenant for quiet possession against any person claiming under him, and A. evict the tenant, an action on the covenant will lie against the husband's executors.

* [44]

SIR *John Astley* granted a lease to the plaintiff, in which there was a covenant in the following words: "And the said Sir *John Astley*, for himself, his heirs and assigns, doth covenant and promise, to and with the said *John Hurd*, his executors, administrators, and assigns, by this indenture, that it shall and may be lawful for the said *John Hurd*, his executors, administrators, and assigns, to have, hold, use, occupy, possess, and enjoy, all and singular the said demised premises, with the appurtenances, and receive and take the profits thereof, to his and their own use and benefit, without any let, suit, trouble, interruption, or disturbance of the said Sir *John Astley*, his heirs or assigns or any person or persons claiming, or to claim by, from, or under him." The lessee having been evicted by lord *Tankerville*, who had succeeded to the estate, this action was brought, upon the covenant, against the executors of Sir *John*. The defendants pleaded, that Lord *Tankerville*, at the time of his entry into the premises, and evicting the plaintiff, "*did not claim, nor was intitled to the premises by, for, or under the said Sir John Astley.*" The cause was tried at the last summer assizes at *Shrewsbury*, when a special verdict was found, which stated, in effect,—That Lady *Astley*, being seised in fee, intermarried with Sir *John Astley*.—That, in 1716, after the marriage, by indentures between Sir *John* and Lady *Astley* of the one part, and trustees therein named of the other part, Sir *John* and lady *Astley* covenanted to levy a fine, the uses of which they thereby declared to Sir *John* for life, remainder to trustees to secure 500*l.* a year to Lady *Astley* for life, remainder over; with a power to Sir *John* to make leases, under the usual restrictions; and with a joint power of revocation to Sir *John* and Lady *Astley*, during their joint lives.—That a fine was accordingly levied.—That, afterwards, by a joint deed executed 1753, they revoked all those uses declared by the indentures of 1716, which followed the estate for life, and power of leasing given to Sir *John*, and declared new uses to Lady *Astley* for life, with intermediate remainders, remainder to Lord *Tankerville* in tail.—That, in 1771, Sir *John Astley* made the lease to the plaintiff, containing the covenant on which the action was brought, and which lease was not agreeable to the leasing power reserved by the settlement.—That the plain-

tiff

tiff entered.—That Sir John Astley died soon after, and all the prior estates being determined, Lord Tankerville's estate vested in possession, and that he had taken advantage of the defect in the lease, and had evicted the plaintiff. The question was, whether Lord Tankerville claimed under Sir John, or only under Lady Astley. If under Sir John, the plaintiff was entitled to maintain this action of covenant.

Leycester, for the plaintiff.—*Bower*, for the defendant.

Lord MANSFIELD desired *Bower* to begin.

He argued, 1. That the deed declaring the uses, and the fine, were to be taken together, and considered as making only one conveyance: and that persons taking by virtue of a power, take under the person who creates the power, not under him who executes it. 2. That a husband is only joined in the fine of a wife's estate for conformity, but that the fine is considered as the act of the wife, not of the husband, and the conveyance is in by her only, inasmuch that, if a wife levy a fine without the husband's concurrence, and he do not enter during the coverture, it will bar her after his death. 3. That, when a revocation of a prior declaration of uses has taken place, under a power to revoke, and new uses are declared, the new declaration of uses makes part of the fine, and is to be taken as the same conveyance with it, in like manner as the first declaration would have been, if it had not been revoked. And, therefore, if persons claiming under the first, were to be considered as in of the wife's estate only, so must those claiming under the second. He cited 1 *Atk.* 560, *ex parte Caswall*, *Bro. Abr.* title *Fines* (a), *Roll. Abr.* p. 346 (b), *Zouch v. Bamfield* (c), *Doe, lessee of Odienne, v. Whitehead* (d), *Beckwith's Case* (e), *Charnock v. Worsley* (f), *Holland v. Jackson* (g), *Mary Portington's Case* (h), *Daniel v. Ubley* (i), *Cromwell's Case* (k).

Lord MANSFIELD said, the case was so clear, that *Leycester* had no occasion to reply. Justice was strongly with the plaintiff. It was true that a fine, and the deed to lead the uses, were to be considered as one conveyance; but as Sir John Astley was a necessary party to the second declaration of uses, by which the estate was limited to Lord Tankerville, his Lordship certainly claimed under him, within the meaning of this covenant. Undoubtedly

Sir

1778.

Hurd
against
Fletcher.

[45]

(a) *Pl.* 33.

(b) *N. pl.* 1.

(c) 1 *Leon.* 82.

(d) 2 *Burr.* 704.

(e) 2 *Co.* 56. b.

(f) *Cro. Elin.* 129. 1 *Leon.* 114.

(g) *Bridgman* 75.

(h) 11 *Co.* 43.

(i) *Sir W. Jones*, 138.

(k) 2 *Co.* 78.

1778.

HURD
against
FLETCHER.

Sir John had covenanted against his own acts, and the new limitations were created by one of his acts.

Judgment for the plaintiff [1].

[1] *Leycester* meant to have cited *Butler v. Swinnerton*, *Palmer* 339.

Tuesday,
24th Nov.

TRINDER against SHIRLEY.

Bail is to be discharged, if the defendant succeed to a peerage.

ON Monday the 16th of November, *Bower* had obtained a rule to shew cause, why an *exoneretur* should not be entered on the bail-piece; the defendant having become a peer, (by succession to his brother the late Earl *Ferrers*.) The ground of the motion was, that it was no longer in the power of the bail to surrender the principal.

Baldwin, for the plaintiff, now declared, that he could not shew any cause against the rule. Upon which it was made absolute.

This was said to be the first instance of the kind that had come before the court.

Saturday,
21st Nov.

* The KING against the INHABITANTS of LEIGH.

* [46]

The removal of a feme covert is evidence of the husband's settlement.

TWO justices removed a married woman, and her child, from *Ewell* to *Leigh*, in the absence of her husband. On an appeal, this order was quashed. The husband afterwards returning to *Ewell*, he, together with the wife and child, were removed, under a new order to *Leigh*; which last order the sessions confirmed; but, upon a *certiorari*, and a rule to shew cause why it should not be quashed, the *Solicitor General* now gave it up, as not to be supported since a late determination of the same question, in the case of *Rex v. Hincksworth* (1) [13].

(1) *H. 18 Geo. 3.*

[13] That case was as follows:—Two justices removed *Sarah*, calling her, in the order, the wife of *Joseph Griffin*, and five of her children, from *Chebbunt* to *Hincksworth*, in the husband's absence, and without having examined him. This order was not appealed from. The husband soon after went to his wife and children at *Hincksworth*, from whence they were

all sent back under a new order to *Chebbunt*. The parish of *Chebbunt* appealed against this order, and producing the former one, insisted that it was conclusive as to the husband, as well as the wife and children. The sessions, however, after hearing evidence as to *Griffin's* settlement, confirmed the new order as to him, and quashed it as to the wife and children. The wife then went back with her children,

THORNTON *against* DALLAS.Tuesday,
24th Nov.

ACTION for money had and received. *Pleas.*—
1. The general issue.—2. A bankruptcy on the 10th of February 1774.—The replication to the second plea admits the bankruptcy, and that the plaintiff's cause of action accrued before; but the plaintiff further says, that, after the 24th of June 1732 (*m*), and * after the making of the statute of 5 Geo. 2. c. 30. and before the issuing of the commission of bankruptcy in the plea mentioned, to wit, on the 6th of November 1754, the defendant was discharged as a bankrupt, and that, on the 2d of June 1764, he was again discharged as a bankrupt, under that act of parliament; “and that the estate of him the said defendant, against whom the said commission was awarded, under which he was declared and became a bankrupt, as in the said plea is mentioned, hath not produced, nor will produce, clear after all charges, sufficient to pay every creditor under the said commission, fifteen shillings in the pound for their respective debts; to wit, at London aforesaid, in the parish and ward aforesaid; and this the plaintiff is ready to verify. Wherefore he prays judgment, and his damages by him sustained, by reason of the non-performance of the several promises and undertakings in the said declaration mentioned, to be adjudged to him, according to the form of the statute in such case made and provided, &c.”—*Rejoinder.*—“That the commission of bankruptcy, under and by virtue of which the said defendant is, in and by the said pleaded in reply,

Though a prior commission be superseded by consent, a second bankruptcy does not protect future effects, unless fifteen shillings in the pound are paid under the second commission.

* [47]

to her husband at *Chefbunt*. After which, a third order was made, removing the children again to *Chefbunt*. This was likewise appealed against, and confirmed as to all, but two of the children who were under seven years of age, as to whom it was quashed. The case had come on in this court the term before, but the first order not having been stated, on which the whole question turned, it was postponed till the order should be brought before the court. *Beecroft* and *Stanley* now argued in support of the last order. *Wallace* and *Thornton* on the other side. Lord Mansfield—The pauper does not complain. There is no

thing in this case. It is admitted, that if they had put into the first order, that it was the husband's settlement, that would have been conclusive, and the omission makes no difference. The general case is, that the husband's settlement is the settlement of the wife [† 19]. There are some special exceptions; as where the husband is beyond sea. But the presumption is in favour of the general rule; and if this had been the case of an exception, it ought to have been stated.—The rule was made absolute to quash all the orders but the first.

(m) 5 Geo. 2. c. 30. § 9.

[† 19] *Rex v. the inhabitants of Ealing*, M. 25 Geo. 3.

1778.
 THORNTON
 against
 DALLAS.

ply, supposed to have been first discharged after the issuing thereof, to wit, on the 26th of *April*, in the seventeenth year of the reign of our Lord the now King, at *London* aforesaid, in the parish and ward aforesaid, by a certain writ of our said Lord the King of *superfedeas*, the date whereof is the said day and year last-mentioned, then and there duly issued out of the court of our said Lord the King of his high court of Chancery, the same court then and still being at *Westminster*, in the county of *Middlesex*, under the great seal of *Great Britain*, was, in due manner, discharged, and superseded."—The like *superfedeas* to the second commission.—*Sur-rejoinder*.—That the original writ in this action was sued out, on the 1st of *November* 1776; and that the *first* commission in the replication mentioned, was superseded, on the petition of the said defendant, by and with the consent of all the creditors who proved debts under that commission; the *second*, in like manner; and, that the same commissions were, and each of them was, superseded, after the suing out of the said original writ.—*Demurrer*, and joinder in demurrer.

[48]

Cowper, for the defendant,—The question is, whether, under the statute of 5 *Geo. 2. c. 30. § 9.* *Dallas* is discharged by the commission of bankruptcy which he has pleaded; or whether his future effects remain liable? There are two grounds made, why the writs of *superfedeas* should not operate in his favour;—1. That they were after the original writ;—2. Because they were obtained on the petition of the bankrupt, and by the consent of the creditors. As to the *first*, the commissions being now superseded, though the bankrupt did not pay fifteen shillings, they are as if they never had existed; and, as to the *second*, I do not understand what difference it makes. The Chancellor has in fact superseded them; and it does not appear what his ground was. If they are become as nullities, the allegation that fifteen shillings in the pound were not paid, is perfectly nugatory. The defendant cannot have the benefit of the former commissions. He should not, therefore, be prejudiced by them. He certainly could not plead his certificates under them. It may be said the *superfedeas* may be obtained by collusion. But collusion is not to be presumed; it should have been pleaded. The probability is, that the bankrupt conformed in every thing that was necessary, the creditors being satisfied. I can find no case on the subject; from whence I infer that no such claim has ever been attempted, where the former commissions were superseded.

Davenport for the plaintiff,—It is under the last bankruptcy that the act requires fifteen shillings in the pound to be paid, in order to protect future effects. The defendant

defendant pleads his last bankruptcy. The replication is, that he became a bankrupt in 1754, and again in 1764. From the rejoinder it appears, that he rested under the bankruptcies of 1754 and 1764, till 1777. That he finds himself pressed upon, because the statute says, unless you pay fifteen shillings in the pound, your future effects shall be liable. Upon this, at the distance of above twenty years from the first of the two commissions, he gets the consent of his creditors under those commissions, and (who have no interest to oppose it,) to their being superseded. He admits that he was *discharged* under the two former commissions. That is sufficient for my purpose; for the words of the statute are express, that when a bankrupt has been *discharged* under a former commission, his effects shall remain liable, unless he pay fifteen shillings under the subsequent commission. He admits that he cannot now pay fifteen shillings. The former commissions are not as if they had never existed. Not only sales of goods, but even a bargain and sale of lands, would stand good.

1778.
THORNTON
against
DALLAS.

Lord MANSFIELD,—There is nothing in this case. The only question is, Whether a *superfedeas* can make a thing not to have been done, which, in fact, has been done? The defendant was *discharged* under the former commissions, which is all that need be enquired about. But besides, the act says, that if a bankrupt has *compounded* his debts, he must pay fifteen shillings under a subsequent commission of bankruptcy, in order to protect his future effects. Here, the creditors had *compounded*, if the former bankruptcies were to be considered as never having existed, for they accepted of the dividend in lieu of their whole debt.

[49]

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*—The bankrupt laws were made for the benefit of the creditors, not of the bankrupt.

Judgment for the plaintiff.

WAITE *against* SEALY and Others.

Friday,
27th Nov.

THE defendants had entered into a bond, in the penal sum of 600*l.* conditioned, *inter alia*, for the payment of a yearly rent of 570*l.* by another person. The rent being in arrear, the bond was put in suit, and judgment by default obtained against the defendant. Afterwards, another action was brought on the same bond, and a second judgment entered up. Then, a third action was commenced, in bar of which the defendants pleaded the first judgment, and then obtained a rule to show cause

Where there is a bond for payment of rent, the bond is only a security to the amount of the penalty.

VOL. I.

E

why

1778.

WHITE
against
SEALY.

why the second should not be set aside, with costs; and why, upon payment of the penalty and costs of the first action, the plaintiff should not acknowledge satisfaction, on record. They stated, in the affidavit on which the rule was granted, that they had not pleaded the first judgment in bar to the second action by a mistake they had fallen into, in considering the second declaration when delivered as being the same, and in the same action, with the first, and only delivered to cure a mistake in the indorsement on the other. The questions were; 1. Whether the bond, in this case, was a standing security for all the payments of rent during the term (which was for twenty-one years), or only to the amount of the penal sum? 2. Whether, upon the equity of the case, and the affidavit on the part of the plaintiff, it did not appear, that it was the intention of the parties, that the sureties should be bound for the rent during the whole term, so as to entitle the plaintiff to retain the advantage he had got by the mistake of the defendant?

The *Solicitor General* shewed cause.—*Dunning and Bower*, in support of the rule.

[50]

BULLER, *Justice*, at first, was strongly of opinion on the first point, (which had not been made at the bar) that, by the statute of 8 & 9 W. 3. c. 11. an obligee of such a bond as this, might, from time to time, assign breaches, and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond, and that the judgment would still remain as a security for all subsequent breaches.

ASHHURST, *Justice*.—That would be very equitable as against the lessee, but extremely hard on sureties, who only mean to bind themselves to the extent of the penalty.

Lord MANSFIELD,—1. As the bond is conceived, are the defendants liable for more than the whole penalty? I think not, upon the true construction of the statute of *William*, the meaning of which only was, that a plaintiff should not, upon every breach, be obliged to go into a court of equity to have issues directed of *quantum damnificatus*. 2. Is there any thing collateral that should make the sureties liable for more? I see nothing in the facts of the transaction, which ought to have that effect. The slip in not pleading the first judgment to the second action, only affects the costs of that action, and not the merits.

BULLER, *Justice*, now declared himself to be of the same opinion concerning the construction of the statute [† 20].

The

[† 20] S. P. *Brangwin v. Perrot*, [C] But, vide *Lord Lonsdale v. Church*, C. B. E. 18 Geo. 3. 2 *Blackst.* 1190. B. R. E. 28 Geo. 3. 2 *Term Rep.* 388.

The rule made absolute, but without costs; some circumstances appearing which satisfied the court, that the lessor was misled by the sureties, with respect to the smallness of the penalty.

1778.

WHITE
against
SEALY.

DOE, Lessee of SIMPSON, against BUTCHER. Tuesday, 24th Nov.

JERVAISE Newton, being seised in fee of the lands in question, devised them to *Sir Michael Newton*, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *Sir Michael Newton* in tail-male, remainder to the lessor of the plaintiff for life, remainder to his first and other sons in tail-male, with divers remainders over. *Jervaise Newton* died in 1728. *Sir Michael Newton* being seised of the lands in question by virtue of the devise aforesaid, by indenture of lease dated the 2d of September 1731, in consideration * of 92*l.* demised them to the defendant, for the term of 99 years, if the defendant, *John Shirburne*, and *William Lasbury*, or either of them, should so long live. *Sir Michael Newton* died in 1743, without issue male; and, on his death, the lessor of the plaintiff entered on the premises, and was seised thereof for his life. *John Shirburne* died in 1767. And afterwards the lessor of the plaintiff, by indenture of lease dated the 30th of June 1767, for the consideration of 30*l.* demised the lands in question to the defendant, from and after the deaths of the defendant, and *William Lasbury*, for the term of 99 years, if *John Griffin* should so long live. Some time afterwards, *William Lasbury* died, and, thereupon, the lessor of the plaintiff, by indenture of lease dated the 29th of November 1769, in consideration of the sum of 30*l.* demised the lands in question to the defendant, for another term of 99 years, from and after the deaths of the defendant and *John Griffin*, if *William Wright* should so long live. The defendant paid his rent to *Sir Michael Newton* during his life, and after his death to the lessor of the plaintiff until several years after the granting of the last-mentioned lease, and also paid heriot to the lessor of the plaintiff, on the death of *John Shirburne*, and another heriot on the death of *William Lasbury*. The lessor of the plaintiff from time to time summoned the defendant, as his tenant to do suit and service at his manor court. The defendant, after the death of *Sir Michael Newton*, laid out considerable sums of money, in improving the lands. The lessor of the plaintiff never questioned the validity of the lease granted by *Sir Michael Newton*, and the defendant had no notice of the defect of title of *Sir Michael Newton* to grant the lease, not being apprized

A lease void against a remainderman, cannot be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession.

* [51]

1778.

DOE
against
BUTCHER.

[52]

prized of any such defect, till about four years before bringing the present ejectment, when, an objection being made by the remainder-man to the power of Sir *Michael Newton*, and of the lessor of the plaintiff, of granting leases for a longer time than their own lives respectively, the lessor of the plaintiff offered the defendant to pay him back the consideration-money of the respective leases granted by him, provided the defendant would account with him for the rents and profits received by the defendant from the time of the death of Sir *Michael Newton*, deducting what he had laid out on improvements; but the defendant refusing to accede to this proposal, the lessor of the plaintiff gave him proper notice to quit the premises before bringing the ejectment. Reversionary leases of the same nature as those above stated, are usually made in the *Western* counties of *England*, to commence not only from the deaths of the persons named in the lease in possession, but also from the end, or other sooner determination, of the lease in possession.

On a special case from the *Western* circuit, stating the facts as above set forth, the question was, Whether the original lease to the defendant was affirmed by any of the acts of the lessor of the plaintiff, after the death of the tenant for life?

On *Tuesday*, the 24th of *November*, this question came on to be argued, by *Gould* for the plaintiff, and *Heath*, Serjeant, for the defendant.

For the plaintiff it was contended, that, the lease having become absolutely void on the death of Sir *Michael Newton*, none of the acts done by the lessor of the plaintiff could re-establish it. That this could not have been done, even by the most formal deed of confirmation, which could only operate on a voidable lease, not on one absolutely void. For this, a late case of *Goodright v. Humphrys*, in the *Exchequer*, was relied on, as directly in point [14]. Although the

[14] *Goodright, Lessee of Wynne, v. Humphrys*, came on, in the court of *Exchequer*, in the form of a special case, which stated; That *Jane, Lady Bulkeley*, having been tenant for life, with remainders over in tail to her first and other sons and daughters, successively, and with power to her to lease for 21 years in possession, and not in reversion, intermarried with *Edward Williams*, who, without her concurrence, demised to the defendant, to hold from the Feast of the Annunciation then next to come, for 99 years, determinable on three lives.—That the lessor died, and afterwards *Lady Bulkeley* died,

leaving *Jane*, her eldest daughter, tenant in tail; who suffered a recovery, and afterwards married the lessor of the plaintiff.—That *Edward Williams* received the rent reserved during his life.—That, after his death, his widow, in like manner, received the rent, and granted receipts.—That the daughter also received the rent till her marriage, and her husband for some time after the marriage, and that a counterpart of the lease was found in his possession.—The court were of opinion, that the lease was void, and gave judgment for the plaintiff.

the receipts of rent, in the present case, have been for a longer time than in the other, that circumstance can make no difference. The reversionary leases cannot affect the title of the lessor of the plaintiff to recover, because the event on which the first of them is to commence, has not happened, for it is to take effect, not on the determination of the former, but after the death of the defendant; *Rector of Cheddington's Case* (q), 2 *Fitzb. Abr.* 161. b. 1 *Lift.* 308.

For the defendant, it was said, that the distinction in the books between void and voidable was founded on mistaken reasoning. Upon similar reasoning, it was formerly held, that a lease made to commence from the day of the date must be a reversionary lease, and therefore void under a power to grant only leases in possession; but, in a late decision of this court, good sense prevailed over authority, and it was determined, that such a lease might be considered as not excluding the day of the date, if such appeared to have been the intention of the parties [15]. In like manner, the old notion, that there could not be cross remainders by implication between more than two, has been exploded, as contrary to sound reasoning [16]. The court always inclines to support, rather than destroy, grants and leases.

1778.

Doe
against
BUTCHER.

[53]

(b) *M. 40 & 41 Eliz. B. R. 1 Co.* 153.

[15] *Pugh v. The Duke of Leeds and another*, *M. 18 Geo. 3.* an issue out of Chancery, tried at *Shrewsbury*, and a case reserved, which stated a power to grant leases in possession only, and not in reversion. The lease in question was to commence "from the day of the date thereof"—*Lord Mansfield*, in a long argument, in which he discussed minutely all the cases on the subject, delivered his opinion, that the words "from the day of the date" might be construed to include that day, and that the lease was good; and *Astton, Willes, and Ashburnst, Justices*, concurred [† 22].

[16] The cases of *Doe, Lessee of Bur-*

den, v. Burville, *E. 13 Geo. 3. Wright v. Lord Cadogan, Holford, and others*, (being a case out of Chancery) *E. 14 Geo. 3. [† 23]*, *Perry and another v. White, Lessee of Bertie*, (which was a writ of error from *B. R. in Ireland*) *E. 18 Geo. 3. [† 24]*, and *Phippard v. Mansfield*, *E. 18 Geo. 3. [† 25]*, were all cases in this court, on cross remainders, by implication, between more than two; and the general principle established by them all, is, that, between two, the presumption is in favour of, between more than two, against cross remainders; but that, by necessary implication, they may be raised between more than two, as well as by express words.

[† 22] Since reported, *Cowp.*

714. [†]

[† 23] Since reported, *Cowp.* 31.

[† 24] Since reported, *Cowp.* 777.

[† 25] Since reported, *Cowp.* 797.

[†] For an instance where "from" was held to be exclusive, *vide Rex v. Gamlingay*, *B. R. H. 30 Geo. 3. 3 Term Rep.* 513. The four days allowed in *B. R.* for pleading in abatement, are both inclusive. *Jennings v. Webb*, *B. R. T. 26 Geo. 3. 1 Term Rep.* 277.

1778.

DOE
against
BUTCHER.

leases. The lessor of the plaintiff, in this case, will not be suffered to say he was ignorant of the defect in Sir Michael Newton's power to grant leases, because, as he took under the will, as well as Sir Michael, he must be presumed to have known the limitations contained in it.

Lord MANSFIELD, on the argument, seemed inclined to support the lease. He said, there could be no confirmation of a thing absolutely void [† 21], but that the acts of the lessor of the plaintiff might operate as a new grant [17]. However he desired it might stand over; and now, just before the rising of the court, his lordship delivered the opinion of the court, very shortly, in favour of the lessor of the plaintiff. He said, there did not appear to have been any intention, either to confirm the old lease, or to grant a new one. Both the lessor of the plaintiff and the defendant had proceeded under a mistake, and had supposed the original lease to be good.

[54]

The *possession* to be delivered to the plaintiff [† 26].

[† 21] *Co. Litt.* 295. b.

[17] In the case of *Goodright, Lessee of Carter, v. Strathan*, which was determined in this court, in *M. 15 Geo. 3.* but was not cited on the present occasion, a mortgage, in the form of a lease, was granted, of a feme covert's estate, by the husband and wife. After the husband's death, the deed being in the hands of the mortgagee, the widow had directed the tenants in possession to attorn to the mortgagee, had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for a considerable number of years. Lord Mansfield said, in delivering the judgment of the court, that they were all of opinion, that the conveyance, in this case, though in the form of a lease, was, in substance, a mortgage, and, not being

within the reason for which leases by a feme covert are held to be only voidable, was absolutely void, on the death of the husband; but that the acts done by the widow, the deed being in possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, is equivalent to a new grant. The authorities on which he said the court relied were, *Perkins, sect. 154*, and the year-books there cited. *Co. Litt.* 36. a. 2 *Roll. Abr.* 26.—The question came before the court, on a motion for a new trial [† 27].

[† 26] *Jenkins, Lessee of Tate, v. Church, B. R. M. 17 Geo. 3. Comp.* 482. S. P. But *Qu.* whether the defendant, in the present case, might not have been relieved in equity? *Vide Stiles v. Cowper. Canc. 8 March 1748. 3 Atk. 692.*

[† 27] Since reported, *Cowp.* 201.

The End of MICHAELMAS TERM 19 GEORGE III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Nineteenth Year of the Reign of GEORGE III.

MILFORD *against* MAYOR.

1779.

Tuesday, 26th Jan.

ON a rule to shew cause why the defendant should not be discharged. The ground was, that by the affidavit on which he was held to bail, it was sworn "that he was indebted to the plaintiff as indorsee of a bill of exchange," but that the bill in fact was not yet due. The defendant was the drawer of the bill, and the drawee had refused to accept it.

If a bill of exchange is not accepted, an action will lie upon it against the drawer, before the time when it is made payable.

BULLER, *Justice*.—It is settled, that, if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, although the time of payment is not come. This I remember to have been determined in the year 1765, in a cause in which Sir Fletcher Norton was counsel for the defendant (a). The reason is this, as Lord MANSFIELD said in that case, that what the drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract. There have been a great many actions of the same sort, since that time.

WILLES, and ASHHURST, *Justices*, of the same opinion [+ 28].

Lord MANSFIELD absent.

The rule discharged.

(a) *Bright v. Purrier*, *Law of Nt.* Pri. 269. Ed. 1775.

[+ 2] In *Macarty v. Barrow*, B.R.E. 6 Geo. 2. 2 Str. 949, the defendant having drawn bills on Spain, which were afterwards protested for non-acceptance, became a bankrupt before they were returned, and, being

arrested, he was discharged upon motion, on the ground that it was a debt contracted before the bankruptcy, and at the very instant when the bills were drawn; 2 Str. 949; and, more fully and accurately, from a note supplied by *Wilmot*, *Chief Justice*, in 3 Wils. 17.

1779.

Tuesday, 26th
Jan.

On a proviso
in a Duchy-
lease,—that
it shall be en-
rolled with
the auditor,—
the certifi-
cate of the
auditor on the
margin is
sufficient evi-
dence of the
enrollment.—
Under-leases
are not within
provisoes con-
cerning assign-
ments.

KINNERSLEY *against* ORPE and Others.

IN an action of trespass, for fishing in the plaintiff's fishery, in part of the river *Dove*, which was tried, at the last assizes, at *Stafford*, before SKYNNER, *Chief Baron*, a verdict was found for the plaintiff, upon which a rule was obtained to shew cause why there should not be a new trial. The plaintiff had declared upon a several fishery, but was not owner of the soil, and the defendants having pleaded the general issue, and also several justifications, as servants to *William Cotton*, the first plea in which *Cotton* was mentioned had called him *the said William Cotton*, although his name had not before appeared on the record. At the trial, the plaintiff's counsel were unwilling to risk the case on the point, which seems still not quite settled, whether a person who has an exclusive right of fishery, but without the soil, can declare on a several fishery. The defendants, on the other hand, could not have availed themselves of their special pleas, on account of the mistake just mentioned. It was, therefore, agreed that the cause should be tried, as if there had been a count on a free fishery, and as if the pleas had been amended; and that, next term, the pleadings should be so amended by consent. The plaintiff derived his title, under a lease dated in 1753, from the *Duchy of Lancaster*, in which there was a proviso, that the lease, and all assignments thereof should be enrolled within three months from the date, with the auditor of the *Duchy*, or otherwise should become void. The original lessee made a lease, in 1777, to the plaintiff, for a term somewhat less than what remained unexpired of the original term. To prove the enrollment of the lease of 1753, a memorandum, or certificate, on the margin of the lease, was read, signed "*Peregrine Fury*, Auditor. No evidence of the enrollment of the second lease of 1777 was offered. The plaintiff had paid the rent to the *Duchy*, up to the time of the trial.

Counsel for the plaintiff, *Adair*, Serjeant, *Howorth*, and *Cowper*, (and, at the trial, *Kenyon*.)—For the defendants, *Beacroft*, *Dunning*, and *Bower*.

The application for a new trial was made on four grounds, viz. 1. Because the verdict was against the weight of evidence produced at the trial. 2. Because the defendants had been surprized by evidence, which they now offered affidavits to contradict. 3. Because there was not legal evidence of the enrollment of the first lease, for that an office-copy of the enrollment ought to have been produced. 4. Because the second lease was an assignment, and not having been enrolled was void.

Lord

Lord MANSFIELD absent.

The court immediately disposed of the two first grounds. They said it did not appear from the report, that the verdict was against the weight of evidence. No surprize was stated by the judge, and the evidence now offered to be laid before the court by affidavit, might have been produced at the trial. On the third and fourth points, the three judges present delivered their opinions to the following effect.

WILLES, *Justice*.—The memorandum on the margin is the certificate of the proper officer, not of a private person, as has been contended at the bar. I cannot distinguish between this case, and that of a bargain and sale, where the indorsement on the back of the deed by the proper officer is always received as evidence of the enrollment. This case too is fortified by the circumstance of long possession under the lease. At any rate, third persons cannot avail themselves of a forfeiture of this sort; but I think the enrollment is sufficiently proved if it were against the grantor. Besides, the lease is admitted, for it is stated in the pleadings and not traversed [1]. The case of *Crusoe, Lessee of Blencoe, v. Bugby* (b), which has been cited at the bar, is conclusive to prove that the second lease, being for a shorter time than what remained of the first term, is not an assignment, but an under-lease.

ASHHURST, *Justice*.—I am of the same opinion. The case in the *Common Pleas* is decisive of the point as to the assignment [c]. And I think the memorandum is sufficient evidence of the enrollment. For what other purpose was it made? But, on the other ground, I do not think it competent to a third person, a wrong-doer, to take advantage of a defect which the grantor has waived; for the rent has been received up to this time [† 29].

BULLER,

[1] *Infra* 58. Note [1].

(b) *T. C. R.* 11 *Geo. 3.* 3 *Will.* 234. since reported in 2 *Blackst.* 766.

[c] In that case the words were, that the lessee, "his executors or administrators, shall not, at any time or times during this demise, assign, transfer, or set over, or otherwise do or put away this present indenture of demise, or the premises hereby demised, or any part thereof." But where the words of a proviso were, that the lease should become void, in case the lessee, his executors or administrators shall, at and during the said term, set, let, or assign over, the said hereby-demised messuage or dwelling-house, or any part thereof, to demise by the lessee's administratrix,

for a term which fell a day short of the expiration of the original lease, was held to be within the meaning of the proviso. *Roe, Lessee of Gregson, v. Harrison*, *B. R. E.* 28 *Geo. 3.* 2 *Term Rep.* 425.

[† 29] It should seem that the acceptance of the rent by the grantor, would not have been a waiver of the forfeiture in this case, as between him and the grantee.—"It is to be observed, where the estate or lease is, *ipso facto*, void, by the condition or limitation, no acceptance of rent afterwards can make it to have a continuance; otherwise it is of an estate or lease voidable by entry;"—*Co. Litt.* 215. a. & cites *Browning v. Beston*,

1779.

KINNERSLEY against ORPE.

1778.

KINNERS-
LEY against
ORPE,

BULLER, *Justice*, I think the lease, with the certificate under the hand of its own officer, would bind the crown itself. The *proviso* is—"That it shall be enrolled with the auditor." I cannot distinguish this case from that of a bargain and sale. The act of parliament (b) in that case, does not provide that the indorsement by the officer shall be evidence of the enrollment, and yet it is constantly admitted. Besides the lease is stated in the replication, and, therefore, (although there is a *protestando* against it by the defendants,) it is admitted as to this cause [1]. On the other point, the case in the Common Pleas is a direct authority (c).

The rule discharged.

Boston, B. R. 2 & 3 Pb. & M. Plowd. 131, where it was so laid down, in argument, by *Ramsay, ibid. 136*. But it was resolved in *Pennant's Case, B. R. T. 38 El. 3 Co. 64. b. & in Finch v. Throgmorton, Scacc. 33 Eliz. Cro. El. 220.*

(b) 27 H. 8. c. 16.

(1) *Qu.* As there was a plea of not guilty, which put the plaintiff on proving all his title.

(c) *Vide Holford v. Hatch, E. 19 Geo. 3. Infra, 174.*

Friday, 29th
Jan.CHANDLER against ROBERTS and Another,
Bail of WHITE.

To a plea to a *sci. fa.* against bail, that the principal died before the return of any *ca. fa.* a replication stating a particular *ca. fa.* and that the principal was alive at the return of that *ca. fa.* ought to conclude to the court.

A *Scire facias* on a recognizance of bail.—The defendants plead, that the principal, before the issuing of the said writ of *scire facias*, and before the return of any *capias ad satisfaciendum*, to wit, on the first day of May 1778, at *Westminster* aforesaid, died. *Replication*—That the several promises and undertakings mentioned in the said declaration whereon the judgment aforesaid was recovered, were, in the said declaration, alledged to be made in *Middlesex*, and that, after the recovery of the said judgment in the said writ of *scire facias* mentioned, against the said John White, and before the suing forth the said writ of *scire facias*, to wit, on the 6th day of May, in the eighteenth year of the reign of our Lord the now King, the plaintiff sued and prosecuted out of the court of our Lord the now King, before the King himself, the said court then and still being held at *Westminster* in the county of *Middlesex*, a certain writ of our said Lord the now King, of *capias ad satisfaciendum*, of and upon the said judgment, directed to the then sheriff of *Middlesex*, by which said writ, our said Lord the King commanded the said then sheriff of *Middlesex*, that he should take the said John, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said Lord the King at *Westminster*, on *Wednesday* next, after one month from the day

[59]

1779.

CHANDLER
against
ROBERTS.

of *Easter*, then next coming, to satisfy the said plaintiff, the said 30*l.* the damages, costs, and charges aforesaid, in form aforesaid recovered, and that the said then sheriff should have there then that writ, which said writ, afterwards, and before the return thereof, to wit, on the 10th day of *May*, in the eighteenth year aforesaid, at *Westminster* aforesaid, was delivered to *Robert Packham* and *Richard Clarke*, so being sheriff of *Middlesex* aforesaid, to be executed in due form of law, at which day, before the said Lord the King at *Westminster*, came the said plaintiff, in his proper person, and the aforesaid then sheriff of *Middlesex*, to wit, the said *Robert Packham* and *Richard Clarke*, returned on the said writ, to our Lord the King at *Westminster* aforesaid, that the said *John* was not found in his bailiwick, as by the said writ, and the return thereof, duly filed and remaining of record in the said court of our said Lord the now King, before the King himself at *Westminster* aforesaid, more fully appears; and the said plaintiff further says, that the said *John*, at the respective times of the suing out of the said writ of *copias ad satisfaciendum*, and of the return, and of filing the same, was and still is living, and in full life, to wit, at *Westminster* aforesaid, and this he is ready to verify, wherefore he prays judgment, &c. To this replication, the defendants demur specially, "because the said replication concludes with a verification, and not to the country."

Morgan, for the defendant, admitted, that this had been the usual form, till 1771, but he relied on the case of *Matber v. Cormick*, *Bail of Collins*, *T. 11 Geo. 3.* and *Brian v. Thorn*, *Bail of Boff*, *M. 14 Geo. 3.* both in this court, and in both of which the replication having concluded with a verification, and having been demurred to, the court recommended to the plaintiff's counsel to move for leave to amend. He also cited *Hanna v. Bristow*, *Bail of Reilly*, *H. 17 Geo. 3.* in this court, where the replication having concluded to the country, upon a demurrer, there was judgment for the plaintiff (without argument), and a writ of error brought, but not proceeded on. He said, he supposed there would be three points made in support of the verification in the replication,—1. That new matter had been introduced, which the defendant ought to have an opportunity of answering.—2. That matter of record, viz. the writ, was stated, which could not be tried by a jury, and yet a conclusion to the country would have put that in issue.—3. That it contained several distinct facts. As to the first, he contended that the new matter was the only inducement which could not be traversed. That the replication denied the whole plea, and, therefore, ought to conclude to the country. That, if it did not, it was bad in substance; 5 *Com. Dig.* 96. 2 *Leo.* 81. 8 *Co.* 67. *Latch.*

[60]

1779.
CHANDLER
against
ROBERTS.

III. *Hardr.* 69. 70. *Cro. Jac.* 588. As to the second, he said that the reasons on which records were not to be tried by the country did not apply to this case; for that this was not like the case of a solemn judgment pleaded. That the question here was merely matter of fact relative to a particular period of time. That, if the defendant had denied the writ, it would have been a departure; 5 *Com. Digest.* 80. *Cro. Jac.* 588. *Raym.* 94. 1 *Sid.* 180. 2 *Roll.* 692. 2 *Saunders* 84. *Vincent v. Attwood*, 10 *Mod.* 256. On the third point he cited *Robinson v. Raley*, 1 *Burr.* 316.

Wood, for the plaintiff, insisted, that the replication was in the usual form, and agreeable to the rules of pleading, and that, in the three instances of similar cases which *Morgan* had cited, there had been no decision of the court.

Lord MANSFIELD recommended to *Morgan* to move for leave to withdraw his demurrer; which was granted without costs.

ASHHURST, *Justice*.—It is proper that it should be known, to avoid future inconvenience, that the ground upon which the court determines is, the introduction of new matter, in which case, the conclusion should always be an averment, in order that the party may have an opportunity of answering it.

BULLER, *Justice*.—It is admitted that, till 1771, this was thought the proper form, and there has yet been no decision to the contrary. In pleading, *via trita via tuta*. It always was the rule, that two affirmatives cannot make an issue; 1 *Leo.* 78. 39 *H. 6.* 49. 32 *H. 6.* 23. In *Mathers v. Carmick*, *Brian v. Thorn*, and *Hanna v. Briflow*, the replication was in the negative—"That the defendant did not die," &c—; and those cases were attempts to alter the established form. It is also an established rule, that wherever new matter is introduced, the pleading must conclude with an averment; *Carth.* 337. *Moore* 286. 3 *Leo.* 165. 1 *Lutwyche* 101. 1 *Saund.* 103. The case of *Filwood v. Popplewell*, 2 *Wils.* 65. is exactly in point, and *Carth.* 4. shews that the particular writ must be stated in the replication. The defendants here might have had either of two defences; *nullius record*; or, that the principal died before the return of the *capias ad satisfaciendum* set forth in the replication. If the plaintiff had concluded to the country, and the defendants had only meant to make use of the first of those defences, an issue would have been sent down, without any fact for a jury to try. In the case in 10 *Modern* the writ was admitted. The account of that case, is but a loose note; the book is of little authority; it is not in any other reporter, and is there stated only as the argument of counsel. If the cases referred to in it applied, then that case was not applicable to the present. If they did not, it was decided without reason or authority.

This is the ancient form of replication, and while it is adhered to, no difficulties will arise [17].

1778.

[C] *S. P. Henderson v. Witley & al*, Bail of O'Bryen, B. R. T. 18 Geo. 3. 2 Term Rep. 576.

WARD *against* HONEYWOOD:

Friday, 29th Jan.

UPON a writ of error from the *Marshalsea* court, the case was this: An action had been brought upon a promissory note, which was made payable on the 28th of April, and, if three days of grace were to be allowed, it did not become due till the first of May. The plaint was intituled of the 24th of April, and a verdict having been found, and judgment given for the plaintiff, it was assigned for error on the first count, that it appeared upon the record, that there was no cause of action at the time of the commencement of the suit.

In the *Marshalsea* court, the plaint is the commencement of the action. It is not settled whether days of grace must be allowed on promissory notes.

Baldwin, for the plaintiff in error, contended, that this was a defect not curable by verdict, and cited *Stafford v. Moore* (d).

Bolton, in support of the judgment, said, that the objection might have been taken advantage of below, for, though the plaint did not appear in the declaration, the defendant might have pleaded it in abatement, or cravedoyer of it, and demurred; but that the defect was now cured by some of the statutes of *jeofail*, either 27 *El. c. 5.* 16 & 17 *Car. 2. c. 8.* or 5 *Geo. 1. c. 13.* He relied on *Hob. 54* 5 *Mod. 286.* and 1 *Leon. 302.* and, particularly on the case of *Aston v. Eels* (e), where, in an action of assault, on a motion in arrest of judgment, because the time laid in the declaration was not yet come, the court said that the jury must be supposed to have given the damages for another trespass, and that it was the same as if no time had been alleged. So here the court, he said, ought to intend that the date of the note was a mistake, as stated in the record, and that another note, due at a time consistent with the commencement of the action, had been given in evidence to the jury. He also insisted that the date of the plaint was a mere legal fiction. That the *capias* supposes a previous plaint, but which in fact never exists, and that the day of the teste of the *capias* was really the time when the action had been commenced. That the practice of the court below warranted the judgment.

[62]

Baldwin, in reply, observed, that, if the *capias* were to be considered as the commencement of the action, still, as the

(d) *B. R. E. 1 Geo. 1. 10 Mod. 311.* (e) *B. R. M. 8 W. 3. 2 Salk. 662.*

1779.

WARD
against
HONEY-
WOOD.

the note had to run, (including the three days of grace,) till the first of *May* inclusive, the *capias* ought not to have been sued out till the 2d of *May*.

Lord MANSFIELD absent.

WILLES, *Justice*.—This case is certainly not within any of the statutes of *jeofail*. Supposing the *capias* did issue the first of *May*, and that it was the commencement of the action, the debt was not then due, for the defendant had the whole day to pay it.

ASHHURST, *Justice*.—If the plaint were like a *latitat*, it might be taken out before the cause of action accrues. This has been determined with regard to *latitats* [† 30]. But it appears, by the case of *Savage v. Knight*, (*f*), (that case had been mentioned by *Bolton*;) that the plaint, in an inferior court, is considered as the original [† 31]. We must take the note to have been proved as laid, and that makes the difference between this, and the case of a trespass, where the day is immaterial.

[63]

BULLER, *Justice*, said, he doubted, whether, by law, three days of grace were to be allowed on promissory notes, though,

[† 30] In *Foster v. Bonner*, B. R. E. 16 Geo. 3. *Cowp.* 454. this was resolved upon solemn argument.

The rule to consider the bill, not the *latitat*, as the commencement of the suit, is subject to several exceptions. For instance; where the defendant has pleaded, that one of the statutes of limitations, had attached *ante exhibitionem bille*, the plaintiff may reply a *latitat*, sued out of the preceding term, and the defendant may rejoin, that the *latitat* was not in fact sued out till the vacation after such preceding term, and after the expiration of the time limited for bringing the action; *Johnson v. Smith*, B. R. E. 33 Geo. 2. 2 Burr. 950. So, if the defendant has pleaded a tender before the exhibiting of the bill, the plaintiff may reply a *latitat* previous to the tender, and the defendant may rejoin, that there was no cause of action at the time when the *latitat* issued; *Wood v. Newton*, B. R. M. 20 Geo. 2. 1 *Wilf.* 141. In like manner, when there is no special memorandum, in which case the bill, by fiction, is, in general, held to be of the first day of the term, if the cause of action arose before the first day of the

term, it will be sufficient for the plaintiff to shew, in evidence, a *latitat* sued out after the cause of action arose; *Morris v. Pugh*, B. R. M. 2 Geo. 3. 3 Burr. 1241. *Pugh v. Martin*, B. R. H. 24 Geo. 3. In *Prodger's Case*, B. R. M. 21 Car. 2. 1 Sid. 432. it had been held, where the demise in ejectment was laid of a date subsequent to the first day of the term, and the declaration was generally of the term, that the plaintiff might shew in evidence, that the bill was, in fact, filed after the first day of the term.

(*f*) B. R. M. 29 & 30 El. 1 *Lea*. 302.

[† 31] In *Leader v. Moxon*, C. B. M. 14 Geo. 3. 2 *Blackst.* 924, 925. it was resolved, that, under the limitation of time for bringing actions against commissioners for executing a paving act, (and in the case of all other statutes of limitations,) it is enough to shew a *capias*, which every body understands to be now the commencement of a suit in C. B. and that, though the plaintiff state in his declaration the suing out of an original, the *capias* is sufficient evidence thereof,

though, in practice, it is usually done (2); but that here it appeared on the record, that there was no cause of action, for it had always been held that the plaint, in the inferior court, is the original, and commencement of the action. That no substance is within any of the statutes of *joofail*.

1778:

WARD
against
HONEY-
WOOD.

The judgment reversed.

[2] In *Deflaux v. Hood* (at Guildhall 1752, *Law of N. Pri.* 274. Ed. 1775.) *Dennison*, Justice, ruled, that by law there are not three days of grace on promissory notes; but the case is mentioned with a *Quere*. The point, I believe, has never been settled by a solemn decision. It occurred in a cause of *Lloyd v. Skutt*, which was tried at the sittings of *Middlesex* after M. 20 Geo. 3. 30th Nov. before Lord Mansfield. That was an action on the statute of usury. The plaintiff declared on a contract to forbear for four calendar

months and three days. The evidence was a promissory note payable at four months from the date, and it was objected by the *Solicitor General* for the defendant, that this was a variance. But Lord Mansfield observing that in a computation of interest made by the defendant himself, and which was in evidence, the three days of grace were allowed, he thought this decisive against him, without determining the general question. The case came on afterwards in court (*Vide infra* E. 20 Geo. 3. p. 336.), but on another point.

BRADFORD against FOLEY and Others.

Wednesday,
3d Feb.

THIS was a case sent from the court of Chancery, for the opinion of the Judges of this court which stated, that *Tempest Hey*, being seised of a considerable real and personal estate, on the 26th of March 1762, made his will, the material part of which was in the following words,—“ I give and devise all and singular my real estates whatsoever, and wheresoever, to *Richard Wright* and *Michael Tovey*, and their heirs, in trust, in the first place, to protect and preserve the contingent remainders, herein, and hereby created and limited, from being defeated and destroyed, and then to and for the several uses herein after mentioned, that is to say, to the use of my son *Thomas Hey* (who now spells his name *Hay*) for and during the term of his natural life, and from and after his decease, to the first and every other son, which he shall have by any future wife, with whom he shall afterwards intermarry, in full male, and for default of such issue male, to the use of and every the daughter and daughters of such future marriage, to have and to hold the same, in case there shall happen to be more than one daughter, to them and their heirs, as tenants in common, and not as joint-tenants. Provided always, and it is my full and express intent and meaning, that if my said son shall hereafter intermarry with

Under a devise,—to the testator's son for life, remainders in tail to his first and other sons, &c. by any future wife, but, if he married any person related to his present wife, in such case to go over to the children of the testator's brother,—the event of the son's marrying a second wife related to his first is not a condition precedent; and, on his death without marrying again, the estate

is in the children of the testator's brother, and does not descend to the testator's son at law.

1779.

BRADFORD
against
FOLEY.

any woman who is any ways related in blood to *Muriel Aysbecombe*, his now wife, that all and every the above limited uses, as far as the same shall relate to the issue of such future marriage, shall utterly cease, determine, and be void, to all intents and purposes, it being my steadfast resolution, as far as the law enables me, to hinder that no person any ways of kin to her in blood, or born or descended from any such person, shall inherit any part of my said estate, and, *in such case*, notwithstanding there shall be lawful issue of my said son by such future marriage living at the time of his decease, my will and mind is, that they nor either of them shall take any thing by and under this my will, but that the said trustees shall stand seised of all and singular the said premises, to the use of all and every the child and children of my late brother *John Hey* deceased, which shall be living at the time of my decease, to have and to hold the same, if more than one child, to them and their heirs, share and share alike, as tenants in common, and not as joint-tenants, such parts or shares thereof as shall respectively belong to the daughters of my said brother, to be to their sole and separate use, independent and exclusive of any present or future husband that they respectively have, or may hereafter have, and not subject to the debts or controul of any or either of them; and, in case *all* and every of the said children of my said brother shall happen to die in my life-time, or after my death, without issue, then I hereby give and devise *all* and singular my said real estate to my right heirs; I mean such heirs only, as shall be no ways related in blood, or claim any descent from any person related in blood to the said *Muriel Aysbecombe*, my said son's now wife; all and every of whom I hereby utterly exclude from any right, title, or benefit from my real or personal estate, in any shape whatsoever."—The testator died in *December* 1763, and left *Thomas Hay*, his only son, and heir at law. The trustees (who were also made executors) proved the will, and, by virtue thereof, entered upon and possessed themselves of the real and personal estates of the testator. There were five children of *John Hey*, brother of the testator, living at the time of the testator's death, viz. *Alice* the wife of *Benjamin Pilkington*, *Mary* the wife of *James Fletcher*, *Jennet* the wife of *Thomas Crompton*, *Tempest Hey* and *John Hey*. In *December* 1768, a commission of bankruptcy was taken out against *Thomas Hay* the son of the testator, and an assignment executed of all his estate and effects, to assignees, in trust for themselves, and the rest of his creditors who should come in and prove their debts under the commission. *Tempest Hey*, the son of *John Hey* the testator's brother, died a bachelor. *John Hey*, the other son of the testator's brother, died some time after his brother *Tempest*, leaving one only child, *Thomas Hey*.

[65]

Hey, an infant. *Mary* the wife of *James Fletcher* died without issue. *Jennet* the wife of *Thomas Crompton* died, leaving issue *Thomas Crompton* the younger. *Muriel Aylshcombe*, the wife of *Thomas Hay* the testator's son, died in the life-time of her husband. Soon after her death, *Thomas Hay*, the son of the testator, also died without issue, and without having married again, leaving *Thomas Farren Hey* his heir at law. On the 3d of October 1771, the said *Thomas Hay* (son of the testator) made his will, and, as to what might become due to him in expectancy or reversion, gave the same to his executors therein after-named, for the uses following, "First to pay his funeral expences, then his just debts that he had contracted, since the first day of March 1769, as far as his effects might amount; but if all his creditors were paid twenty shillings in the pound, and there should be an overplus, after all the expences were discharged, then he gave the same to his niece, *Amelia Heydon* for her own proper use," &c. The plaintiff claimed under *Thomas*, the son and heir at law of the testator; the defendants, under the children of the testator's brother, *John Hey*. The question for the opinion of the court was, "Whether the children of *John Hey* the brother of the testator had taken any, and what estate in the case that had happened?"

The case was argued, on Friday the 29th of January, and this day, by *Hood*, for the defendants, and *Morris*, for the plaintiff. The court directed *Hood* to begin.

He contended, that the children of the testator's brother had taken estates-tail, with cross remainders, although the previous event, on which the devise to them was limited, had never happened. 1. To shew that words like those in the present case, were not to be construed as constituting a condition precedent, but as words of limitation, he cited *Jones v. Westcomb* (g), *Gulliver v. Wicket* (h), *Page v. Heyward*, cited in that case (i), and 1 Roll. Abr. 835. 2. He said the intention of the testator was certainly to exclude the children that his son might have by his then wife, and yet, according to the argument which would be made use of for the plaintiffs, such children, if there had been any, must have taken in the event that had happened.

For the plaintiff, *Morris* insisted, that, if there was such a thing now in the law as a condition precedent, this was clearly one. That the cases cited by *Hood*, as well as others of the same sort, viz. *Avelyn v. Ward* (k), *Andrews v. Fulham*,

1779.

BRADFORD
against
FOLEY.

[66]

(g) M. 1711. Prec. in Chan. 316.

Eg. Ca. 245.

(h) B. R. M. 19 Geo. 2. 1 Wilf.

105.

VOL. I

F

(i) B. R. T. 3 Ann. 2. Salk. 570.

Piggot 176.

(k) Canc. 19th of March 1749.

1 Ven. 429.

1779.

BRADFORD
against
FOLEY.

v. Fulham [3], and *Statham v. Bell* [4], all went upon the idea of a double contingency, and that the only thing to prevent the subsequent limitation from taking effect in possession was the intervention of the estate limited first. That those authorities were not now to be shaken, but that they did not apply to this case. That, in every view, the old reversion here must have remained. In the other cases, the contingency was annexed to the precedent, here to the subsequent, estate. He cited *Arton v. Hare* (1). and contended, as to intention, that it did not appear that the testator had taken into consideration the event of his son's having children by his then wife, and not marrying again.

Lord MANSFIELD,—Nothing can be clearer than that the testator meant that no child of *Muriel Aysbecombe* should take in any event, and yet, according to Mr. Morris's argument, such child (if there had been one) must have taken. We will take time to consider of our certificate.

The case was not afterwards mentioned in court. The certificate was in the following words:

"We are of opinion that the children of *John Hare* the brother of the testator *Tempest Hare*, took estates tail with cross remainders.

MANSFIELD.

E. WILLES.

W. H. ASHHURST

F. BULLER."

8th February 1779.

[3] *B. R.* Cited 1 *Vez.* 421. *Jones v. Westcomb*, *Andrews v. Fulham*, and *Gulliver v. Wickett*, were all cases on the same will.

[4] *Statham v. Bell and others* [† 32] was a case from the Court of Chancery, argued in this court, *E. 14 Geo. 3.* 26th April, by *Kenyon* for the plaintiff, and *Davenport* for the defendants. The facts were as follow.—*Statham* having an only child, a daughter, made his will, whereby, reciting that whereas his wife *Mary Statham* was then pregnant, he devised his estate to his son, if his wife should be delivered of a son, when he should attain the age of 21. If she should have a daughter, then he devised one moiety of the estate to his wife, and the other moiety to his daughters, when they

[67] should attain their ages of 21 years. And if either of them should die before that time, then her share to the survivor, and if both should die under 21, then the other moiety to go to the wife. The testator died without hav-

ing any child after the making of the will, his wife not having been enfeoffed and the daughter died before she was 21. The question was, whether the plaintiff, the testator's heir at law, or the widow, who married *Bell* the defendant, should have the estate, in the event which had happened. The certificate was in the following words:—
"Having heard counsel and taken the case into consideration, we think it was the plain intention of the testator, that, in case no son should be born, and he should have no daughter who should live to attain the age of 21 years, his wife should have the whole estate; therefore, in the event which has happened, we think *Mrs. Bell* took an estate in fee-simple in the whole of the premises."
question.

May 16th,
1774.

Mansfield.

R. Aston,

E. Willes,

W. H. Ashhurst

(1) *T. 37 El. Poph.* 97.[† 32] Since reported, *Cowp.* 40.

1779.

OXLEY *against* BRIDGE.Wednesday,
3d Fe.

THE first day of this term, the paper-book in this cause had been delivered to the defendant, containing the common replication to a sham plea of a judgment recovered; with a rule to return it on the *Wednesday* following, 27th of *January*. He returned it on the *Thursday* before 9 o'clock, having struck out the special pleading, and substituted the general issue in its place. The plaintiff refused to receive it, unless the defendant would agree to deliver it as of *Wednesday*, which he not consenting to, the plaintiff signed judgment.

On a rule to plead by a particular day, that day is construed to continue till the office open next morning.

On a rule to shew cause why this judgment should not be set aside for irregularity, it was contended for the defendant, that by the practice of the court, when a day is fixed for pleading, &c. that day is considered as continuing till the office opens next morning, and that you are regular if you comply with the rule before that time. And the court being of that opinion (*m*), the rule was made absolute [5].

Wood, for the plaintiff.—Douglas, for the defendant.

(*m*) But vide *T. 19 G. 3. Haeflar v. Ansell. infra*, 187.

[5] This suit was by original. By not returning the paper-book till the *Thursday*, the defendant prevented the plaintiff from having judgment of this term. Eight days notice of trial (exclusive) is required by the rules of the court. If the paper-book with the general issue had been returned on the *Wednesday* (27th *January*) notice of trial might have been given for the *Thursday* evening following (4th *February*), for which day the second sitting in term at Guildhall was appointed. This was

before the last return day, (11th *February*) when the *disfringas* would have been returnable. Being not returned till *Thursday*, the eight days went beyond the fourth of *February*, and there was no sitting after that till the last day of term (12th *February*), which was after the last return. If the plaintiff had sued by bill, this advantage could not have been taken; because the return may be on any day in the term. But then the defendant might have hung up the cause for twelve months by a writ of error in the *Exchequer Chamber*.

1779.

Thursday,
4th Feb.LENCH *against* PARGITER.

The groats under the Lords' act must be paid every Monday. — A judge's order for a prisoner's discharge under that act, made out of term, is final.

THE defendant had been brought up on a *Wednesday*, to be discharged under the Lords' Act (o), but was remanded on the plaintiff's paying him two shillings and four-pence, and giving him a note for the payment of the like sum, on *Wednesday*, in every subsequent week. In the last vacation, the defendant applied to WILLES, *Justice*, to be discharged, on the ground, that the two shillings and four-pence had not been paid, nor the note made, agreeable to the directions of the statute, which are, that the payment of the groats shall be made on *Monday* in every week, and the note framed accordingly. It was admitted that the payments had been regularly made the first and every *Wednesday* till the defendant's application to be discharged. WILLES, *Justice*, was of opinion, that the defendant was entitled to his discharge, and, on the first day of this term, made an order for that purpose. On *Thursday*, the 28th of *January*, Baldwin moved for a rule to shew cause why that order should not be set aside, and the plaintiff be at liberty to retake the party, and stated, that the constant practice in this court had been to pay the groats on that day week on which the party was brought up, and so successively, and to make the note for payment on those days. In this he was confirmed by the officers of the court. He cited also *Shaw v. Gimbert*, in *Barnes* (p), where, in the *Common Pleas*, the money was made payable on a *Thursday* [6]. He urged, that the spirit of the act had been complied with, as the prisoner had been paid weekly. That, in another case in the same book, where the money was made payable on *Monday*, the plaintiff having slipped that day, but having tendered it on the *Tuesday*, the Court of

Common

(o) 32 G. 2. c. 28. § 13.

(p) M. 7 G. 2. *Barnes quarto* edit. 369.[6] This case, and *Beech v. Paxton*,

must have been upon some temporary statute. This happened more than twenty years before the Lords' act passed [† 33].

[† 33] Probably on 2 *Geo. cap. 22*; and there is a remarkable difference between the words of that act, and those of the perpetual Lords' act. In that of 2 *Geo. 2.* the words are, "unless the creditor do agree, by writing under his hand, to pay and allow weekly, a sum not exceeding 2s. 6d. per week, unto the said pri-

soner, to be paid the first day of every week;" § 9. But, in 32 *Geo. 2. c. 28.* the words are, "shall agree by writing, &c. to pay and allow weekly a sum, &c. unto, &c. to be paid every Monday in every week;" § 13. This difference reconciles the cases in *Barnes* to the practice of C. B. under 32 *Geo. 2.*

Common Pleas refused to discharge the prisoner; *Beech v. Paxton*, widow (q).

1779.

LENCH
against
PARQITER.

Morgan now shewed cause, and insisted on the words of the statute, and that there was a good reason why all payments should be made on the same day, especially in the great prisons in *London*, because the servants belonging to the prisons knew, thereby, when they must attend. He said the defendant could not waive his right, by accepting of the note and payments. That the note at first was not such an engagement as warranted the court in remanding him, and as to his subsequent discharge, a discretion was, by the act, vested in a single Judge in vacation, which, having been exercised by *WILLES, Justice*, in this case, ought to be final.

Lord MANSFIELD, — This case must be considered with a reference to the application, which was made in the vacation; and a single Judge having then a complete authority, I do not see how the court now can controul the order. Mr. *Justice WILLES* consulted the other Judges at *Serjeant's Inn* before he signed it, and they thought it right. They afterwards sent him word that they doubted, and he sent to recall his order, but it was too late. As to the general point, enquiry has been made, and the practice in this court has been as stated by Mr. *Baldwin*, and the officers, for above thirty years. In the *Common Pleas*, it has always been otherwise. There, the plaintiff pays the fraction from the day of the application to the next *Monday*, and then gives a note for, and makes his payments on, every *Monday* afterwards. The Judges of the *Common Pleas*, say there never was a note in that court made payable on *Tuesday*; so that *Barnes* must have mistaken [† 34]. In the present instance, although we think the man has no right to the advantage of the mistake after having received the money, the order is final. In future, as it is proper that the practice of all the courts should be uniform, and that of the *Common Pleas* is most consonant to the words of the act, let all notes be made payable on the *Monday*. It is much more convenient that there should be one common day, that the turnkey may know when to attend. But it is to be understood that no other prisoner, already remanded, will be discharged, because the payment is not on a *Monday*, unless the *Monday* happens to be the day when he was remanded.

(q) E. 6 G. 2. *Barnes quarto edit.*
367.

[† 34] *Vide* the foregoing page,
Note [† 33].

1779.

Saturday,
6th Feb.The KING *against* the INHABITANTS of
STOCKLAND.

If the master of an apprentice die, and the executor, at the pauper's request, agree that he shall go to live with another person, a service of forty days with such person, before the term of the apprenticeship expires, gains a settlement under the apprenticeship.

A PAUPER was removed to the parish of *Stockland*, and the sessions confirmed the order, stating as follows.—That the pauper was bound an apprentice in husbandry, by the parish of *Stockland*, to *John Davis* of that parish, till he should be twenty-four years of age. That he lived there four years, under that indenture, when the master died. That he continued with his master's son, who was his executor, and had proved his will, for about seven years, in the same parish; when, being desirous of living with his uncle, in the parish of *Ottertoun*, to learn the trade of a miller, his uncle and he applied to the executor for his consent, who gave his consent accordingly, saying he would do any thing for the benefit of the pauper, and that then the pauper made an agreement with his uncle for 1 s. 6 d. per week, and continued with him, in the whole, two years and an half; at the end of the first four months of which time the pauper attained his age of twenty-four years.

The *Solicitor General* now argued in support of the order. He contended, that the contract between a master and his apprentice is merely personal, and dies with the master. This has been decided in the case of *Baxter v. Burfield* (r). By law there can be no valid assignment of an apprentice. An assignment is indeed evidence of the original master's consent to the apprentice's residence with the new master; but here that presumption fails, because the original master did not exist when the pauper was assigned.—He endeavoured to distinguish the case from the *King v. Bridgeford* (s).

Dunning and *Fanshawe* on the other side.—They said, if an apprentice resides in a parish, by the consent, either of his master, or the executor or administrator of the master, he gains a settlement; and, for this, they cited the *King v. Bridgeford*. Here, there has been no dissolution of the apprenticeship by the act of the parties, and no case has gone so far as to decide, that an apprenticeship is of course dissolved by the death of the master. It has only been decided, that an apprentice cannot be compelled to serve the master's representative. The case of *Baxter v. Burfield* was founded on the contract having been made for the purpose of teaching the apprentice a trade, which an executor

(r) B. R. E. 20 Geo. 2. 2. Str. 1266.

(s) T. 12 G. 2. 2 Str. 1115. S. C. Burr. Sett. Cases, No. 43.

ecutor might not be able to teach. There never has been such a decision as to parish apprentices, and the reason does not apply to their case.—They cited the *King v. Clapham* (t), and the *King v. Tavistock* (u), to shew, that, after an apprentice has been once transferred, the consent of the original master is not necessary to a subsequent transfer of him. But they chiefly relied on the *King v. Bridgeford*, as having gone much farther than this present case would do; because, there, the assignment was by a person who had only the right to the administration, but had not administered.

Lord MANSFIELD,—Though an apprentice is not strictly assignable, nor transmissible, yet if he continue, with the consent of all parties and his own, it is a continuation of the apprenticeship. The case of *Bridgeford* is much stronger than this.

Both orders quashed.

(t) E. 20 Geo. 2. *Burr. Settl. Cases*, No. 19.

(u) T. 7 G. 3. *Burr. Settl. Cases*, No. 186.

HAYLEY against RILEY.

Saturday,
6th Feb.

ACTION of debt, on a replevin bond, and a verdict for the plaintiff. The defendant obtained a rule to shew cause why the verdict should not be set aside, *the cause having been suspended, after issue joined, for above a year, and then brought to trial, without giving a term's notice* [6].

Baldwin now shewed for cause, that the trial had been stopped by the defendant himself, under an injunction from the court of *Exchequer*, and said, that the court would never suffer a party to avail himself of a privilege arising from a delay which he himself had occasioned.

The *Solicitor General*, on the other side, insisted, that the trial without notice for a term was irregular, and that the verdict must be set aside; for which he cited *Peyton v. Burdus* (w). He contended, that, on a proper application to the court of *Exchequer*, the plaintiff might have had leave, before answer, to proceed to trial, and that it was universally understood, in practice, that an injunction is no excuse for not complying with the established rule.

Lord

If a defendant suspend a cause by an injunction for a year, and afterwards the plaintiff proceed to trial without a term's notice, and obtain a verdict, the court will not set aside the verdict.

[6] Rules of C. B. M. 1654, § 21. do not find when this rule was adopted by the Court of King's Bench. It makes no part of the body of rules made by that court in the same term;

M. 1654. [C] It was introduced in B. R. T. 5 & 6 Geo. 2.

(w) B. R. M. 12 G. 2. 2 Str. 1110. —Vide also *Bogg v. Rose*, E. 15 G. 2. 2 Str. 1164.

1779.

HAYLEY
against
RILEY.

Lord MANSFIELD expressed his indignation at the defendant's endeavouring to take advantage of a delay occasioned by himself, to protect himself against a deed under his own hand and seal, and seemed surpris'd when he was informed, that the injunction had issued without any affidavit by the defendant, (the plaintiff in equity), of any fact which entitled him to a stay of proceedings.

BULLER, *Justice*, said, the practice was as it had been stated by the *Solicitor General*; that it was grounded on the principle, that the injunction was no proceeding in the cause depending in this court; but that he thought this a case where the court might very well alter the practice (7). [† 35].

The rule discharged.

[7] In *Bosworth v. Philips*, T. 11 Geo. 3. which was a case parallel to this, the court of Common Pleas held, that the rule only extends to voluntary delays by the plaintiff, and that a delay by an injunction is, from the nature

of the thing, an exception to the rule. 2 *Blackst.* 784. *Vide Walter v. Stuart*, C. B. T. 13 Geo. 3. 2 *Blackst.* 918.

[† 35] *Vide Worsal v. Stewart*, B. R. M. 23 Geo. 3.

Saturday,
6th Feb.

LILLY and Others against EWER.

In a policy of insurance, "sailing with convoy," means "sailing with convoy for the voyage."

THIS was an action for money had and received, brought against an under-writer, for a return of premium. The policy was on the ship the *Parker* galley; "at and from Venice to the Currant Islands, and at and from thence to London;" at a premium of five guineas per cent.; "to return 2l. per cent. if the ship sailed with convoy from Gibraltar, and arrived." The ship touched at Gibraltar on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, but the convoy was destined only to go to a certain latitude, about as far as Cape Finisterre, being ordered on the Lisbon station; and accordingly, the ship and convoy separated, and the ship arrived safe at London. The only question in the cause was, Whether, by the terms of the policy, the condition for the return of premium was, a departure from Gibraltar with such convoy as could be met with, for whatever part of the voyage that might happen to be, or, a departure with convoy for the voyage? The trial came on at Guildhall, before Lord MANSFIELD, and a common jury, at the last sittings, when a verdict was found for the plaintiff.

On the second day of this term, a rule was obtained to shew cause, why there should not be a new trial, and the case came on to be argued this day; when, upon

1779.

Lilly
against
Ewen.

Lord MANSFIELD's report of the evidence, it appeared, that the plaintiffs had called witnesses, (one of whom was Mr. Gorman, an eminent merchant,) who swore, that, for some few years past, when convoy for the voyage, or the whole voyage, was intended, those explanatory words had been added, and that, by this usage, the expressions of "sailing with convoy," and "sailing with convoy for the voyage," had received distinct technical meanings; "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words, "for the voyage," or "for England," were added. The captain proved, that, at the time when he left Gibraltar, no other convoy was to be had.—The witnesses for the defendant swore, that they understood the words "with convoy" to mean *convoy for the voyage*; and the broker said, that, at the time when this policy was signed, he understood, and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual when convoy for the voyage was meant. His Lordship, after stating the evidence, said, that when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the evidence, to ask the opinion of the witnesses on the construction, but to learn whether there was any usage in this case which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury.

Dunning and Davenport, for the plaintiffs—Bearcroft and Baldwin, for the defendant.

For the plaintiffs it was insisted, that the question had been fairly and completely tried. The sense in which the words were to be understood, depended on the usage. His Lordship had stated to the jury, the interpretation they must receive, independent of usage, and told them, if they were not satisfied with the evidence for the plaintiffs on the head of usage, they must find for the defendant. The verdict must, therefore, be considered as having been found upon full consideration of the proof as to the usage.

For the defendant, it was argued, that the obvious and natural import of the words, and also the weight of the evidence, were in his favour. Even if the words were doubtful, according to a known and established rule of law, they ought to be construed most strongly against the person who used them. Here, they were the words of the insured, and in the nature of a warranty on his part.

[74]

It

1779.

LILLY
against
EWEA.

It was also said, that when partial convoy was meant, it had of late been a frequent practice, especially in policies on this *Levant* voyage, to specify how far the convoy was to come; as, "*convoy to the Cape*," "*convoy to Lisbon*," &c.

LORD MANSFIELD,—On the words, I was strongly of opinion, that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy which might be designed to separate from the ship in a minute or two; though, when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy must continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause, because the sense contended for by the plaintiffs was not inconsistent with the words of the policy; and, therefore, it was material to see what the usage was. I laid great stress on Mr. Gorman's testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that people in the city are dissatisfied with the verdict, and think the evidence of the plaintiffs witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms. It may be hard, because words have been added in some instances, to force a construction in this case, from the omission of them. The question is of great importance.

The rule made absolute [7].

[7] The new trial came on before Lord Mansfield, at the sittings after Trinity Term, 19 Geo. 3. when a verdict was found for the defendant. *Vide* the case of *Jeffery v. Legender*, 3 Lev. 320. B. R. M. 3 W. & M. or *Jefferys v. Legendra*, as it is called in other books; 2 Salk. 443. 1 Show. 320. 4 Mod. 58.

Holt, 465. where, according to *Levinz*, upon a special verdict, finding a warranty in these words, "*warranted to depart with convoy*," *Holt*, Chief Justice, and the greater part of the court, held, that these words mean sailing with convoy for the whole voyage [† 36].

[† 36] *Vide* *Gordon v. Morley*, and *Campbell v. Bordell*, *Guildball*, H. 20 Geo. 2. 2 Str. 1263.

1779.

DOE, Lessee of WATSON and Others, against
SHIPPHARD.Monday,
8th Feb.

IN an action of ejectment, a special verdict was found, which stated;—that *John Hewitt*, being seised in fee of several messuages, tenements, and lands, in the counties of *Essex* and *Lancaster*, by his will, bearing date the 2d of July 1727, devised as follows; viz. all his messuages, tenements, lands, and hereditaments, in *Essex*, to four trustees and their heirs, (one of whom, named *Charles Shippard*, was the defendant,) upon special trust and confidence, that they should, out of the rents and profits thereof, levy and raise the sum of 20 l. and pay the same to *Rachel Shippard* his daughter, and then wife of *Thomas Shippard*, annually, during her natural life, by four quarterly payments, to her separate use; and, upon the farther trust and confidence, that they should pay and dispose of all the residue of the rents and profits, as also of the whole rents and profits thereof after the decease of his said daughter, to the use of the said *Thomas Shippard* for the term of his natural life; “and, in case my said daughter *Rachel* should happen to survive the said *Thomas Shippard* her husband, then, upon trust and confidence, that they the said trustees shall stand and be seised, of all and every my said messuages, lands, tenements, and hereditaments, to the several uses, intents, purposes, and upon the several trusts, herein-after mentioned, viz. to the use and behoof of my said daughter *Rachel*, for and during her natural life; and, from and after the decease of my said daughter, then, to the use and behoof of my grandson *Hewitt Shippard*, son of the said *Thomas* and *Rachel Shippard*, and the heirs of his body, and, for default of such issue, then, to the use and behoof of the heirs of the body of the said *Thomas Shippard*, begotten or to be begotten on the body of the said *Rachel* his wife, and, for default of such issue, then to the use and behoof of the heirs of the body of the said *Rachel* my daughter, by any other other husband, and in default of such issue, then to the use and behoof of the said *Thomas Shippard*, and his heirs for ever. Item, I do give, devise, and bequeath, all my messuages, lands, tenements, and hereditaments, in the several parishes of *Eccles* and *Deau*, in the county of *Lancaster*, to the said (trustees), upon the several trusts, and to and for the several uses, intents, and purposes, herein-after mentioned, viz. to the use and behoof of the said *Thomas Shippard* and *Rachel* his wife, and the survivor of them, until such time as the said *Hewitt Shippard* my grandson

Under a devise of land;—to trustees to pay 20 l. of the rents and profits to the testator's daughter, and the rest to her husband, and the whole rents and profits to the husband after the daughter's death; and, in case the daughter should survive her husband, then (the land) to the use of the daughter for life; and, after her death, to the use of her son in tail, then to the heirs of the body of the husband, by the daughter, then to the heirs of her body, then to the heirs of the husband;—the daughter dying before her husband, the limitations over shall not take effect, the contingency not being confined] to her life-estate, but affecting all the other limitations, and operating as a condition precedent.

1779.

DOE
against
SHIPP-
HARD.

grandson attain the age of twenty-five; and from and after the decease of the said *Thomas Shippard* and *Rachel* his wife, and the survivor of them, and, after my said grandson's attaining his age of twenty-five years, which shall first happen, then to the use and behoof of the said *Hewitt Shippard* my grandson and the heirs of his body; and, for default of such issue, or his dying under the said age, then to the use and behoof of the heirs of the body of the said *Thomas Shippard* begotten, or to be begotten, on the body of the said *Rachel* his wife; and, in default of such issue, then to the use and behoof of the heirs of the body of the said *Rachel* my daughter, by any other husband; and, in default of such issue, then to the use and behoof of the said *Thomas Shippard*, his heirs and assigns for ever."—That, on the testator's death, *Thomas Shippard* his son-in-law entered upon all the devised premises, and held them till the time of his death. That *Rachel* died in the life-time of her husband. That the husband died in July 1771, leaving *Hewitt Shippard*, his only son and heir at law, who, on his father's death, entered upon all the devised premises, and enjoyed them till his death. That *Thomas Shippard* never had any other issue by his wife *Rachel*, but *Hewitt Shippard*, who died in December 1775 intestate and without issue. That three of the trustees were dead; and that *Charles Shippard*, the defendant and surviving trustee, was the eldest brother and heir at law of *Thomas Shippard*, and also the eldest uncle and heir at law, on the part of the father, of *Hewitt Shippard*. That *John Watson*, and *Mary* the wife of *John Powell*, two of the lessors of the plaintiff, were nephew and niece, and heirs at law of the testator, and also heirs at law, on the part of the mother, of *Hewitt Shippard*.—The ejectment was brought for the estate in *Essex*. The case was argued on Friday the 5th of February.

Balguy, for the lessors of the plaintiff, stated the question to be, Whether the limitation in fee of the *Essex* estate to *Thomas Shippard*, had taken effect? That the whole depended on the clause beginning, "and in case my said daughter," &c. and on the fact that the daughter had not survived her husband. He said, that if, in the event which had happened, there was no devise over, the lessors of the plaintiff were entitled to recover. That, upon the face of the will, the testator appeared to have provided for two events. 1st, That of the husband's surviving his wife. That, in contemplation of that event, he had given him a life-estate after his wife's death; and that after his death he might naturally mean that the estate should descend to his grandson, who appeared to have been a favourite. 2d, That of the wife being the survivor. That

[77]

the

IN THE NINETEENTH YEAR OF GEORGE III.

the limitations over after her death were only made *in case* she should happen to survive her husband. That, if the contingency of her surviving were to be considered as annexed only to her life-estate, and not as a condition precedent before any of the uses limited over could arise; then, in the event which had happened, *Thomas Shippard* the husband became tenant for life, with remainder in tail to his son *Hewitt* (then in *esse*, remainder in tail to himself. That, if so, he had it in his power to have barred all the issue of his wife, except *Hewitt* the son. That this could never be the testator's intention, because it was clear that he meant particularly to provide for ALL children of his daughter. That if he had foreseen what had happened, the death of his daughter and her only child without issue, he never could have meant that, in such event, strangers should be preferred to his own blood. That a material argument arose from the diversity between this and the devise of the *Lancashire* estate; for that, there, as the testator meant no condition precedent, he had annexed no conditional words to the subsequent estates, but had limited them over in direct terms. That, if the intention were not so clear as it appeared to him to be, yet, as the words were clear, the court would not explain them away, in order to adapt them to a doubtful intention. That it was rare that cases cited on the construction of wills were very apposite, and he should only mention *Davies v. Norton* (x), being, as he said, a stronger case than the present, and where there could have been very little doubt about the intention.

Howorth, for the defendant, contended, that no man who was not a lawyer, upon reading the will, could entertain any doubt of the testator's intention to vest the fee of the *Essex* estate in his son-in-law, *Thomas Shippard*. That the disposition of the *Lancashire* estate corroborated the argument, because it was manifest from thence, that he was a great object of his favour and bounty, the remainder in fee of that estate being undoubtedly given to him in all events. That if the construction contended for on the part of the lessors of the plaintiff were to prevail, this absurdity would follow, that the son-in-law himself could derive no benefit from the devise in his favour, because he must be dead, before the contingency could happen by which the remainder in fee was to vest in him. That the testator did not mean any contingency by the words "*and in case, &c.*;" for that to give them that operation would be to suppose he intended a partial intestacy. That if they should be construed to express a contingency, yet that contingency only extended, and was annexed to the life-estate to *Rachel*,

1779.

DOE
against
SHIPP-
HARD.

[78]

(x) *M.* 1726. 2 *Perre Wms.* 390.

and

1779.

Doe
against
SHIPP-
HARD.

and did not affect the subsequent limitations, which were all meant to be vested remainders. That the case of *Napper v. Sanders* (y), which was cited and relied on by Lord HARDWICKE, in *Tracy v. Letbieullier* (z), was in point, in favour of this construction. That the determination in *Davies v. Norton* was inexplicable, the intention being manifest the other way [8]. That here the collateral heirs of the testator were not once mentioned in the will.

Balguy, in reply, insisted, that his construction was most consonant to the intention of the testator. That there was nothing absurd in supposing that, in the event of his daughter's dying before her husband, he meant a partial intestacy, for then the estate would by course of law descend to his favourite grandson. That as to the contingency being only annexed to the daughter's estate, such a construction was so plainly against the words of the will, that nothing but a direct authority could support it. But that the case relied on was very distinguishable from this. That, in that case, there was no contingency previous to the estate to the feoffees, but the contingency immediately preceded and was annexed to the particular estate of *Elizabeth Sanders*, and therefore the subsequent limitations being (as Lord HARDWICKE said in *Tracy v. Letbieullier*) substantive limitations, and independent of the former, they arose out of the seisin of the feoffees, although the estate to *Elizabeth* could not, as the contingency, on which her estate was to depend, had not happened. That here, on the contrary, the trustees were to stand seised only on the contingency of the wife's surviving her husband, and that all the limitations were connected with that event, and dependent upon it.

The court took some days to consider; and now, Lord MANSFIELD, after stating the case, delivered their opinion to the following effect:

[79]

Lord MANSFIELD,—The question is, whether the limitations over are to take effect in the event which has happened, of *Thomas Shippard*, the husband, having survived his wife, the testator's daughter? Now there are no express words limiting the estate over on that event, and yet it is plain that it was foreseen by the testator, for he gives the rents and profits to the husband after the death of the wife. The testator then proceeds to say, "and in case my said daughter *Rachel* should happen to survive the said *Thomas Shippard* her husband, then upon trust," &c. The court may supply the omission of express words, if they find

(y) *Hutt.* 118.(z) *Can.* 1754. 3 *Atk.* 774. *Ambl.* 204.

[8] It was but the single decision of

Reynolds, Justice, who tried the cause, and for whose opinion a case was reserved.

find a *plain intent*, but unless that is the case, they cannot do it; and, upon full consideration of the whole of this will, we do not find there is sufficient for us to gather such intent, so as to warrant us in supplying the omitted words. Guesses may be formed, but that is not enough. Perhaps, *quod voluit non dixit*. We cannot make a will for the testator. Conjectures may be made both ways. The argument, which was drawn by Mr. *Howorth* from the devise of the *Lancashire* estate, turns the other way. There may be a reason why the testator might not intend the limitations over to take place, except in the event of the daughter's surviving her husband, viz. to secure the estate in tail to his grandson, *Hewitt Shippard*, against any preference his daughter might shew to her issue by any subsequent husband. If she did not survive him, there could be no danger of that sort, as the estate would descend to *Hewitt Shippard*. This bears no resemblance to the famous case of *Jones v. Westcomb* (a), for, there, the intention was clear that, failing the child, the estate should go over to the devisees in all events.

1779.

DOR
against
SHIPP-
HARD.

Judgment for the plaintiff [✓].

(a) *M. 1711. Prec. in Chan. 316. Wilkinson, B. R. H. 28 Geo. 3. 2 Term*
Eq. Ca. 245.. Rep. 209.

[✓] *Vide Doe, Lessee of Vessey, v.*

The KING against the MAYOR and BURGESSES
of LYME REGIS, on the prosecution of DA-
VID ROBERT MITCHELL.

Monday,
8th Feb.

MANDAMUS to restore *David Robert Mitchell* to the office of a capital burghers of *Lyme Regis*. The writ—after reciting that *Mitchell* was duly elected, admitted, and sworn, a capital burghers of the said borough, and as such capital burghers had always behaved and governed himself well, yet that they * the said mayor, &c. without any just or reasonable cause, had unjustly removed the said *Mitchell* from his office of a capital burghers—commanded them to restore him, or cause him to be restored, to his office, or to signify cause to the contrary.—To this, the defendants returned, “that *Mitchell* was not “duly elected, admitted, and sworn, a capital burghers of the “said borough, and therefore they could not restore him, “or cause him to be restored.”

A return to a mandamus to restore, stating, that the prosecutor—“was not DULY ELECTED, admitted, and sworn”—is bad.

* [80]

On Saturday, the 6th of February, the sufficiency of this return was argued, by *Rooke* for the prosecutor, and *Lawrence* for the defendants.

Rooke,—

1779.
The KING
against
LYME
REGIS.

Rooke.—The return does not deny that *Mitchell* had been, *de facto*, in possession of the office of a capital burges; therefore, the conclusion, that they cannot restore him, does not follow from the premises. The complaint is, that he has been removed from an office, from which they had no right to remove him. They may restore him, whether he was *duly* elected, sworn, and admitted, or not. The *mandamus* states, that he was duly elected, &c. only by way of inducement, and the defendants ought to have set forth the reasons for which they turned him out. The restoring him upon this *mandamus* could not decide the right. After he has been restored, *that* may be tried in the regular way by a *quo warranto*. The question is, Whether a corporation, having once admitted a member, can afterwards disfranchise him for want of an original qualification? Now it is so plain that they have no such authority, that there is not a hint of it in any case I have ever met with. The causes of amotion are enumerated in *Bagge's Case*, 11 Co. (b), in *Carth.* 176. (c), and in 1 *Burr.* 538. (d), but this is no where stated as one of them.—(Lord MANSFIELD—"Are you not hampered by the writ?")—The writ is in the usual form. The word "*duly*" is in all the precedents in *Tremayne*, and the other books. It is merely a word of inducement. The gist of the complaint is the removal. All the general books, and many of the reports, confound the *mandamus* to admit, with the *mandamus* to restore. *Non fuit debite electus* is a good return to the first, but not to the other, and this clue leads to the explanation of all the contradictory *dicta* on the subject. Upon principle, it is clear that a corporation ought not to have the power to remove a corporator *de facto*, on a defect of title. The franchise is the corporator's freehold. Entry by the feoffor cannot divest the estate of a man duly enfeoffed. After a descent cast the disseisee cannot recover the land by entry. So, a clerk who has been presented under a bad title, and has been instituted and inducted, acquires a possessory right, which cannot be divested but by *quare impedit*. The analogy between corporate and other rights would be overturned, if a man could lose his franchise for defect of title, by the mere vote of the corporation who admitted him. Great inconvenience would arise, if a power to disfranchise, on a defect of title, were vested in corporations. Many would be totally overturned by it. In this borough, the capital burgeses are elected only by the capital burgeses, but the disfranchisement is by the corporation

[81]

(b) T. 13 Jac. 1. 11 Co. 93. b.
(c) 2 & 3 W. & M. Sir Thomas
Earle's Case.
(d) E. 31 G. 2. Rex v. Richardson.

He cited also Rex v. Mayor of Derby.
T. 8 Geo. 2. Cases Temp. Lord Hard-
wicke 153. and Hereford's Case, 6
16 Car. 2. Sid. 209.

1779.

The KING
against
LYME
REGIS.

corporation at large. If they could disfranchise on a supposed want of title, the right to elect would be a nugatory privilege in the select part, because it might be frustrated by an immediate removal by the whole body. It is easy to see, to what extent this power might be abused. After disfranchisement, and a *mandamus* to restore, the corporation might put the party to a traverse, or action on the return, and, if he succeeded, and obtained a peremptory *mandamus*, they might again dispute his title by *quo warranto*. Besides, this sort of removal may be put in practice at any distance of time, after possession for 30, 40, 50 years,—although this court will not trust themselves with the authority of removal, in the regular way, after possession for twenty years [9.] The rule would be nugatory, if, by another mode, the limitation could be evaded. Certainly, when the court established the rule, it was intended to prevent any impeachment of a corporator's title after 20 years, by any private persons. This power too, might be partially exercised, at very critical periods. For instance, a mayor elect might be removed before he is sworn; and this is not ideal, for it happened in this very case. *Mitchell*, being mayor elect, was disfranchised as a capital burgess, by which means he could not be sworn in to his office of mayor, without a *mandamus* to restore him; and in the mean time, the old mayor now holds over. By the same sort of management, with a majority in the corporation, the same mayor might be continued for life. These are some of the inconveniencies which would follow from such a right vested in the corporation, and there can be none from their not possessing it.

[82]

Lawrence,—The question is, Whether the suggestion in the writ is sufficiently denied? In all cases, the party who applies for the *mandamus* is supposed to know his own title best, and if the right, as he states it, is denied by the return, that is enough. Unless the right is that which the party says it is, in the writ, the court cannot know that he has any right, and the motives which influenced them in granting the writ would no longer exist. Here, the suggestion is, that *Mitchell* had been *duly elected, admitted, and sworn*, and that he has been unjustly removed. If he was not *duly elected, admitted, and sworn*, the reason for restoring him ceases. Had the writ suggested only *that he was elected*, it would have been a bad return, in such case, to have said, that he was not duly elected, for that would then have been a negative pregnant. In the present return, every thing on which *Mitchell* founds his title is denied. Is it meant

[9] This rule was established in the *Winchelsea* causes, *M. 7 Geo. 3. 4 Burr.* 1962. and explained in *Re v. William Rogers, H. 10 Geo. 3. 4 Burr.* 2522.

1779.
The KING
against
LYME
REGIS.

[83]

meant to be contended, that nothing but the fact of the removal can be questioned on a *mandamus* to restore? If so, it would not be competent even to deny that the party had ever been admitted. But I insist, that it is sufficient to deny any part of the title suggested, either the dueuess of the election, or the dueuess of the admission. In the case of *The King v. The Mayor of Lynne*, of which Sir James Burrows has furnished me with a note, and which is also reported in *Andrews* (e), Lord Chief Justice LEE said, that it was enough if any part of the suggestion was denied. (BULLER, Justice,—“According to the note I have “of it,” he said, “if any material part was denied.”) In the case of *The King v. Sir Henry Penrice*, reported in *Strange* (f), it was held that if any immaterial circumstance is alleged, it is a good return to deny it, even though the answer amount to a negative pregnant. (WILLES, Justice,—“That was the case of a *mandamus* to admit.”) As to *Hereford's* case, it does not appear there, nor in any of the other cases mentioned there, that the writ suggested that the party had been *debito modo admissus*, or *electus*. In the case of *The Queen v. Twitty* (g), the suggestion being *debito modo electus*, and the return *non debito modo electus*, Lord Holt said, that was a good return, for it was an answer to the writ. That, indeed, was a *mandamus* to admit, but the reason given will apply in the case of a *mandamus* to restore. In *The King v. Lambert* (h), which is reported in *12 Modern* (i), the writ, which was a *mandamus* to restore, was *debito electus*, the return *nunquam debito electus*, and it was held good, “because it was a direct answer.” If *Lambert's* case, which is reported in *Carthew* (k), is the same, it is there, by mistake, called a *mandamus* to admit. (BULLER, Justice,—“*12 Mod.* is not a book of any authority.”) In the case of *The King v. Hill*, in *Shower* (l), it appears, from Lord Holt's argument, that the *mandamus* was to restore, and there, likewise, *non debito modo electus* was determined to be a good return, and for the same reason, “because it followed the writ.” *Stevenson v. Nevenson*, as reported by Lord Raymond (m), was a *mandamus* to restore, and it appears that, on the trial of the issues in that case, Mr. Serjeant Pehgelly called witnesses to prove the due election. In *Crawford v. Powell*, the writ suggested a due election, and the return was, not duly elected, and was not objected to (n). All those cases prove that the return may deny the suggestion in the very words of the writ.

(e) H. 11 Geo. 2. *Andrews* 105.

(f) T. 18 Geo. 2. *Str.* 1235.

(g) M. 1 Anne. 2 *Salk.* 433.

(h) M. 2 W. & M.

(i) 12 *Mod.* 2.

(k) 170.

(l) M. 2 W. & M. 1 *Sb.* 253.

(m) E. 10 Geo. 3. 2 *Ld. Raym.* 1358
1 *Str.* 583.

(n) T. 33 & 34 Geo. 2. 2 *Burr.* 1013.

writ. In Hilary, 16 Geo. 3. *The King v. The Churchwardens of Taunton St. James* [† 37], was the case of a *mandamus* to restore L. C. to the office of sexton, suggesting that he was duly elected. The return was, "Not duly elected," and it was held to be good. (BULLER, *Justice*,—"I argued that case, and this point was not made a question. The return also stated, that the sexton was removable at will, and the argument went upon the question whether those two matters could be joined in the return.") The precedents in *Tremayne* and other books afford no argument, for there is no settled form for this writ in the Register, and it is always adapted to the circumstances of the case. Either it is necessary to suggest the dueness of the election, or it is not; if it is, it is proper to deny it; if it is not, they ought not to have suggested it. As to the supposed negative pregnant in the return, viz. that it admits that *Mitchell* had been in possession, that is not so; it admits no part of the suggestion; neither his former admission, nor the removal. The sort of certainty required in returns, is ascertained by Lord Holt in the case of *The King v. The Mayor of Abingdon* (o), and it appears there, that when a thing follows by necessary inference that will be sufficient. The court cannot intend from this return, that *Mitchell* had been in possession *de facto*, because the only allegation of the writ is, that he was duly in possession, and that is fully denied; yet, all the arguments of inconvenience proceed upon the supposition, that the return admits a *de facto* possession. On the other side they have admitted, (by arguing the sufficiency of the return, and not traversing it,) that *Mitchell* was not duly elected. It appears, therefore, clearly, that he is without title, and, in such a case, although the return should be insufficient, the court will not award a peremptory *mandamus*; *Rex v. Tidderley* (p), *Basset v. The Mayor of Barnstable* (q).

Rooke, in reply,—It seems to be agreed, that a corporation has no right to disfranchise its own members for want of title, and the only dispute now is, whether *Mitchell* was in possession. It is said that the writ suggests a due election, which the return denies, and therefore nothing is admitted by the defendants; but if, knowing our own case, we have stated it right, we ought not to be in a worse condition, than if we had only said that he had a bad title. They should have denied either the fact of admission, or the fact of removal; for the right is immaterial. In the case of

1779.
The KING
against
LYME
REGIS.

[84]

[† 37] Since reported, *Cowp.* 413. (p) *M.* 12 Car. 2. 1 Sid. 14.
(o) *E.* 12 W. 3. 1 *Ld. Raym.* 559. (q) *E.* 18 Car. 2. 1 Sid. 286.

1779.

The KING
against
LYME
REGIS.

The King v. The City of Chester (r) the court expressly makes the distinction between a *mandamus* to restore, and a *mandamus* to admit; and, wherever a case of *mandamus* has been decided with that distinction in view, and upon solemn argument, I will venture to assert that *non debito modo electus, admissus, et juratus*, has not been held to be a good return to a *mandamus* to restore. All the cases cited on the other side, which relate to offices not corporate, are beside the present question. The rights of churchwardens, sextons, and coroners, cannot be tried by *quo warranto*; therefore, where there are different claimants, the court will grant a *mandamus* to each, and let them litigate the right in that manner. If we were to take issue on this return, and go to trial, and obtain a verdict, the court could then only grant the peremptory *mandamus* on the ground of prior possession, for the right could not be questioned at the trial. The corporation cannot contest it at all; the King only by *quo warranto*. The conclusion of the return is, that they cannot restore. Why? Because *Mitchell* was not duly elected. That inference is not true, for they must restore, if there has been a *de facto* election. The return at most denies the actual possession only by argument, which is insufficient; for Lord *Holt* says, that the certainty in returns should be as great as in indictments.

[85]

LORD MANSFIELD, — I have often said, that I was particularly anxious that every part of corporation-law should be settled on clear and certain principles, and not on nice subtleties and verbal distinctions. We will therefore consider of this question. At present, it strikes me to be sufficient if the suggestion of the writ is fully denied, whatever that is. I am not thoroughly aware of the sense and meaning of the distinction between elected and duly elected; because it seems to be a contradiction to say, that a man has been elected, and at the same time to say, he has not been duly elected; they seem to me the same. On an issue to try if a man has been elected, he must prove a due election. In general, where a person takes upon him to suggest what he was not bound to do, that may be denied. But another thing strikes me at present; the return should be such as, if true, would shew that the party has no *right* to be restored, and therefore it ought to deny the material part. In the case of *Lynne*, (a very full note of which Mr. *Justice BULLER* has shewn me,) they go very nicely into the arguments upon this head. There, it was denied that there was any admission. Here, they deny that *Mitchell* was duly elected, admitted, and sworn, in the conjunctive. Upon such an issue, he must prove all the three allegations; yet the dueness of his election is immaterial, for the corporation could not judge of the title. I give no opinion.

(r) *M. 6 W. & M. 5 Mod. 10.*

This day, his Lordship, after stating the writ and return, delivered the opinion of the court, as follows.

LORD MANSFIELD.—The question is, whether this is a sufficient return. The grievance complained of, by the person applying for the writ, is, that, having been duly elected, admitted, and sworn, he has been removed by the corporation; and *they* are to shew a just cause of removal. It is admitted, that they could not remove for want of an original title; but it is contended, that they have sufficiently answered the suggestions of the writ, and that issue may be taken, or an action brought, on the return. Upon full consideration, we are all of opinion, that the return must answer, not the words, but the materiality of the writ, and nothing shews this more than the nicety in the cases as to *elected* and *duly elected*. In the case of *Lynne*, the whole turned upon the question, Whether it was a return to the material part? A return which seems to be guarded, and not to deny the substance, is bad, although I rather think nothing is an election but a *due* election. Here the material suggestion is the removal. They were not to judge of the title. The return is in the conjunctive,—not duly elected, admitted, *and* sworn, and, therefore, fallacious. If the truth would have warranted it, and they had returned not duly elected, *or* admitted, *or* sworn, it might have been good. We are all of opinion, that the return is insufficient, and therefore a peremptory *mandamus* must issue.

1779.

The KING
against
LYNNE
REGIS.

[86]

DEVON and Another, Assignees of GASCOYNE,
a Bankrupt, *against* WATTS.

Monday,
8th Feb.

IN an action of *trover*, by the assignees of a bankrupt, a verdict having been found for the plaintiffs, and a rule obtained to shew cause why there should not be a new trial, the case came on to be argued this day, when the question was, Whether, under the particular circumstances, an assignment of a lease which had been made by the bankrupt, was an act of bankruptcy?

An Assignment of a lease, part of a bankrupt's estate, made, in contemplation of a bankruptcy, to some of the creditors, is an act of bankruptcy.

Upon the report of the evidence, the facts appeared to be, That on the 30th of *November*, *Gascoyne*, the bankrupt, sent for one *Hall*, his attorney, to advise with him about his affairs, when he shewed *Hall* a decree of the court of *Chancery* against him, and told him, he had been served with a *subpoena*, and was threatened with an attachment, but was not able to pay the money. He asked *Hall*, whether his creditors could not be forced to take a composition, who told him they could not, and that, if the attachment should issue, he must pay the money. He then told *Hall*,
that

1778.

DEVON
against
WATTS.

[87]

that some of his creditors had looked into his affairs, and they thought he could not pay above eight shillings in the pound. *Hall*, upon this, advised him to become a bankrupt. He sent again for *Hall*, on the 2d of *December*, and then named to him some creditors who had been long great friends to him, and had indorsed bills for him which were not yet due, which would distress them, and said, that as he could not pay the bills, the only method by which he could secure them, would be, by an assignment of the lease in question. On the 3d of *December*, *Hall* went to him again; and was told by him, that *Cox*, one of his creditors, had been with him, and had said that *Blake*, attorney for *Cox*, thought matters might be settled without a bankruptcy. At four or five o'clock in the afternoon of the 3d of *December*, the assignment of the lease was executed to three of his creditors—*Watts*, *Giles*, and *Hall*.—After the execution of the assignment, *Hall* went to *Blake*, when, upon his stating to him the situation of *Gascoyne's* affairs, *Blake* agreed it was proper a commission should be sued out. Some of the creditors were present at this meeting, and mentioned the lease as a part of *Gascoyne's* estate; on which *Hall* told them of the assignment, but did not mention when it was made. The lease was worth about 400*l.* and was only assigned to secure about 250*l.* and was then to be held in trust for the bankrupt, his executors, administrators, and assigns. The assignment recited that *Giles* had become security for the bankrupt. *Hall* had lent him money, and several bills and notes had been indorsed for the bankrupt, by *Watts*, *Giles*, and *Hall*, which remained unpaid, and he had agreed to assign the lease, in order to secure the payment of those debts.

Dunning and *Peckham*, for the plaintiffs.—The *Solicitor General*, for the defendant.

For the plaintiffs, it was argued, that this was a fraudulent conveyance within the statute of 13 *Eliz. c. 5.*; and that, by 1 *Jac. 1. c. 15.* fraudulent conveyances are made acts of bankruptcy. Three facts are clear: 1. *Gascoyne* was insolvent at the time of the assignment, for, by his own account, he could only pay eight shillings in the pound. 2. He intends to prefer the assignees of the lease, to his other creditors. 3. When he made the assignment, he intended an act of bankruptcy. In *Worsley v. Demattos* (1), an assignment, by deed, of all a trader's stock, though by way of security, and for a valuable consideration, was held to be an act of bankruptcy. In *Linton v. Bartlett* (2), an assignment, by deed, of only one third of the bankrupt's effects, by way of security, was determined to be an act of bankruptcy. In the case of *Rust and Another, Assignees of Papp*,

(1) B. R. H. 31 G. 2. 1 Burr. 467.

(2) C. B. H. 10 G. 3. 3 Wilf. 47.

Papps, v. Cooper, which was determined in this court T. 17 Geo. 3. a parol assignment of *part*, as a security to a creditor, and under very favourable circumstances, but in contemplation of an act of bankruptcy, was held to be a fraud against the bankrupt-laws, and therefore void [† 38]. It was not an act of bankruptcy, because it was not by deed, but such an assignment by deed is in itself an act of bankruptcy.

For the defendant, it was said, that the assignment was of real property, and there was a *bonâ fide* consideration for it. The circumstances of the overplus, after paying the creditors to whom the assignment was made, being limited to the bankrupt, (which was insisted upon on the other side as evidence of an intention to defraud the other creditors,) is a proof of the fairness of the transaction. It is like the case of a mortgage, where the mortgagee must account for the overplus to the mortgagor, or those who stand in his place. If the surplus had been limited to the other creditors, or the assignees, *that* would have plainly shown that an act of bankruptcy was in contemplation. *Worsley v. Demattos* went on the particular circumstances of the case, which were very strong, but it was not there laid down, as a general rule, that a *bonâ fide* assignment to a fair creditor, even though in contemplation of an act of bankruptcy, is void. *Russ v. Cooper* differed from this case, for, there, it was clear the bankrupt could not stand longer than the *Saturday*, and the order was sent, by express, to deliver the goods before that time. The creditors, here, were informed of this assignment, and did not object to it. It was said, this assignment was a fraud, in particular, upon the creditor under the decree and attachment, but *he* could not have taken the lease, if there had been no assignment, the attachment being only an execution against the person.

LORD MANSFIELD said, he continued of the same opinion which he had entertained at the trial, *viz.* that this was a fraudulent deed, and an act of bankruptcy. He thought it was fraudulent on two grounds: 1. It was fraudulent against the creditor under the decree. The court of *Chancery* would have relieved him against the defendant, and given him the benefit of the lease, notwithstanding the assignment was for a valuable consideration; for if any man, knowing of a judgment, or a decree, purchases, though for a full value, the purchase is fraudulent and void. This was established in *Twyne's Case* (u). The creditor in equity might have had a sequestration of the lease. 2. In the other view, the assignment was a clear fraud against the general creditors under the bankrupt-laws. The bankrupt

G 4

was

1779.

DEVON
against
WATTS.

[88]

[† 38] Since reported, *Corwp.* 629.(u) *M.* 44 *Eliz.* 3 *Co.* 80. *b.*

1779:

DEVON
against
WATTS.

was advised, and agreed, to have a commission sued out; and, after that, made the assignment. It was said, the creditors were told of the assignment. The manner in which they were told of it was the worst part of the case; for the bankrupt concealed from them, when or how it was made, and they had no reason to suppose that it was not made long before. All amicable commissions are agreed to by the creditors, on the idea that there is to be no preference.

[89]

BULLER, *Justice*, observed, that the preference given to the defendant, and the two other assignees of the lease, was voluntary, for they had not applied to the bankrupt for payment of their debt. The motive perhaps was not culpable, but the transaction was contrary to the general policy of the law.

The rule discharged [† 39].

[† 39] Since the former edition of these Reports was published, the following important case has been determined in the court of *King's Bench*.

HASSELS and Another, Assignees of JACKSON, a Bankrupt, v. SIMPSON.

This cause came on in *M. 21 Geo. 3.* before his Honour the late Master of the Rolls, (Sir *Thomas Sewell*,) who directed an issue to try the following question; viz. "Whether *Jackson* was a bankrupt, within the true intent and meaning of the several statutes made relating to bankrupts, at the time of the execution of a certain indenture, dated the 14th of *August* 1773, and made between the said *Jackson*, (therein described to be a mercer and grocer,) of the one part, and the defendant on the other part, witnessing, among other things, that the said *Jackson* had sold and delivered to the said defendant, all the household-furniture, goods, chattels, and personal estate, of the said *Jackson*, (except as therein excepted,) subject to the proviso therein mentioned?"

The trial of this issue came on, at the spring assizes for the county of *Stafford*, 21 *Geo. 3.* before *Nares*, *Justice*, when a verdict was found for the plaintiffs.

In Easter Term following, *Howorth* obtained an order, in the court of Chancery, to shew cause, why there

should not be a new trial; which was afterwards argued, on the 21st of *June*, 21 *Geo. 3.* but the Lord Chancellor did not deliver his opinion till *April*, 23 *Geo. 3.* when the order was made absolute.

The second trial came on before the same Judge, and a special jury, at the summer assizes for *Staffordshire*; and, upon that occasion, a case was reserved for the opinion of the court, the purport whereof was as follows:

Ralph Jackson, of *H.* in the county of *Stafford*, grocer, was, on the 28th of *November* 1777, being the day on which the commission of bankrupt issued, a trader, within the true intent and meaning of the several statutes made, and now in force, concerning bankrupts. He became indebted to the petitioning creditor, in 100*l.* by bond, bearing date the 13th of *August* 1770, and payable on the 13th of *February* 1771. Some days previous to the 14th of *August* 1773, he applied to one *Child*, an attorney and conveyancer, to propose an indemnity to *Simpson*, the defendant, against a bond in which *Simpson* had joined with him, to a *Mrs. Bartlom.* At the time of this application, *Child*, to whom he was quite a stranger, asked him what property he had; and he answered, that he had the newly built house, mentioned in the indenture of the 14th of *August* 1773, besides his household goods and stock in trade. He had no writings

with him. *Child* then asked, Whether he had any objection to include the household goods and stock in trade, in the indemnity. He said, he had not; and that he had drawn rather too much money out of trade, towards building the house; and that the money borrowed of *Mrs. Bartlom*, and for which *Simpson* had become bound, was to replace the money so taken out of trade; and that he wished to indemnify *Simpson*, in such manner as *Child* should think reasonable and right. Thereupon, *Child* prepared the indenture in question.

It recited, That the defendant, at the instance and request of *Jackson*, and for his proper debt, together with *Jackson*, was, by a bond of the same date, bound to *Mrs. Bartlom*, in the penal sum of 400*l.* conditioned for the payment of 200*l.* with interest, on the 14th of the ensuing *February*; that it was agreed between *Jackson* and the defendant, before the execution of the said bond, that the defendant, his heirs, executors, and administrators, should be sufficiently indemnified therefrom, out of the copyhold and personal estate of *Jackson* therein mentioned; and that he should surrender, grant, and assign, the same to the defendant, his executors, administrators, or assigns, in such manner as he or [90] they should direct, for the purpose aforesaid. It then witnessed, that, in pursuance, and in part of the performance of the said agreement, and in order to indemnify the defendant, his heirs, executors, and administrators, from and against the said bond, and the principal and interest thereby secured, and all costs, charges, and trouble, any ways concerning the same, the said *Jackson*, for himself, his heirs, executors, administrators, and assigns, did covenant with the defendant, his heirs, executors, and administrators, and every of them, that the said *Jackson* and his heirs, and all other persons having any estate or interest in the copyhold premises therein after-mentioned, should, at his and their costs and charges, within three months after the date of the said indenture, at some court baron, to be

held for the manor of *Newcastle under Lyne*, surrender into the hands of the lord of the said manor, or of his steward, according to the custom of the said manor, free from all incumbrances, all

that new erected copyhold messuage, situate in *S.* within the said manor, then in the occupation of *Jackson*, or his under-tenants or assigns, together with all barns, stables, &c. thereto belonging, to the use of the defendant, his executors, administrators, and assigns, for the term of 500 years, to be computed from the date of the surrender; provided, that if *Jackson*, his heirs, executors, or administrators, should, on or before the 14th of *February* next ensuing, pay the said 200*l.* and interest to *Mrs. Bartlom*, and, in the mean time, and until payment thereof, should save harmless, and keep indemnified, the said defendant, his heirs, executors, and administrators, and his and their goods, chattels, lands, and tenements, from and against the said bond, and the principal and interest thereby secured, and all costs, charges, &c. concerning the same, then the said indenture, and the surrender so to be made, should from thenceforth cease, determine, and become void. Then there was a covenant by *Jackson* to pay the 200*l.* and interest according to the said proviso, and that he had done nothing to charge or impeach the title to the said messuage. The indenture then further witnessed, that, for the same considerations, and in further part performance of the said agreement, *Jackson* did bargain, sell, and deliver to the defendant, his executors, administrators, and assigns, all the household-furniture, goods, chattels, and personal estate, of the said *Jackson* therein mentioned; that is to say, &c. (here followed an inventory of furniture in *Jackson's* house), and all other the goods, chattels, stock in trade, and personal estate, whatsoever, of him the said *Jackson*, situate at *S.* aforesaid, or elsewhere in the kingdom of *England*, (wearing-apparel excepted,) to hold the same, to the defend-

1779.

DEVON
against
WATTS.

1779.

DEVON
against
WATTS.

ant, his executors, administrators, and assigns, for ever, subject, nevertheless, to the proviso aforesaid; and the said *Jackson* did thereby grant to the defendant, his executors, administrators, and assigns, in default of the payment of 200*l.* and interest, on the day mentioned in the proviso, full power, at any time or times, to enter into the premises of the said *Jackson*, and to take, carry away, and sell, any of the said goods and chattels. Then *Jackson*, by the said indenture, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors, administrators, and assigns, that they would warrant and defend the goods and chattels so bargained and sold to the defendant, his executors, administrators, and assigns, subject to the said proviso, against him the said *Jackson*, his executors and administrators, and every other person and persons whatsoever; of all which goods and chattels the indenture stated, that the said *Jackson* had put the defendant in full possession, by delivering to him a silver tea-spoon, in the name of all the said goods and chattels, at the sealing and delivery of the said indenture.

This indenture was duly executed by *Jackson*. A commission of bankruptcy, bearing date the 28th of November, 17 Geo. 3. issued against him; and his estate and effects were assigned by the commissioners to the plaintiffs, on the 31st of December, 17 Geo. 3. *Jackson*, at the time of the execution of the indenture, was in full credit. The house therein mentioned was then worth 400*l.* and his personal estate worth 800*l.* more. He continued in trade, and in credit, until the month of October 1776.

The question stated for the opinion of the court was the same with that contained in the terms of the issue.

The case came on to be argued, M. 24 Geo. 3. on Tuesday the 25th of November, by *Nares* for the plaintiffs, and

[91] *Bower* for the defendant; but, it being alleged, on the part of the defendant, that *Jackson* was worth a great deal more than the money borrow-

ed of Mrs. *Bartlom*, at the time of the execution of the indenture, and that it did not appear on the case, that he owed any thing at that time, but that debt, and that due to the petitioning creditor; the court directed the argument to stand over till the next term; and that, in the mean time, the parties should enquire, whether *Jackson* owed any other debts at that time, and, if it should appear that he did, that an addition, stating such other debts, should be made to the case.

No such addition, however, was made, and the case came on again for argument, in H. 24 Geo. 3. on Tuesday, the 3d of February,

Lord Mansfield directed *Bower* to begin.

He informed the court, that, in consequence of what had passed last term, there had been an attendance at *Buller* Justice's chambers; and that the defendant had there offered to admit any debt, previous to the execution of the indenture, which the plaintiffs should verify by affidavit, and that they had not attempted to prove any in that manner. The defendant, he said, cannot prove a negative; and, therefore, the court will presume that *Jackson* was no otherwise indebted than as is stated in the case.—(Lord Mansfield,—“The court will not presume one way or the other; the case only says, *Jackson* was in good credit; a man may be in very good credit, and yet owe a great deal.”)—This case has been twice before the Chancellor on the same state of facts that appears now before this court; and his Lordship strongly inclined to think there was not enough to establish an act of bankruptcy. The question is, Whether the assignment and conveyance, contained in the indenture in question, being expressly made as an indemnity to the surety, is such a conveyance as constitutes an act of bankruptcy, within the meaning of the statute of 1 Jac. 1. c. 15. § 2. the words of which are, “or make, or cause to be made, any fraudulent grant, or conveyance, of his, her, or their lands, tenements, goods, or chattels, to the intent, or whereby, his, her, or their, creditors shall or may

1779.

DEVON
against
WATTS.

be defeated or delayed, for the recovery of their just and true debts?" as to actual fraud, or undue preference, no such thing was pretended, or attempted to be proved. *Jackson* does not appear to have owed more than 100*l.* to all the world at the time; and this case differs materially from all the others which have arisen on this cause of the act of parliament, in this circumstance, that the party, to whom the conveyance was made, was not a creditor at all at the time, nor then likely ever to become a creditor. It is not stated that he ever did, and, in fact, he did not, become a creditor till after the commission of bankruptcy issued. It may be proper to mention the leading cases, to shew how much they are distinguishable from the present. In *Worsley v. Demattos* (a), the conveyance was, it is true, an indemnity; but it was made at a time when the bankrupt was so much indebted, as to be unable to carry on his trade, without the assistance of *Demattos*; and it was made for the purpose of being a floating security to him, for contingent acceptances of bills to be drawn upon him by the bankrupt. There were, besides, many circumstances of fraud in that case. In *Linton v. Bartley* (b), the assignment was to an actual creditor at the time, and was made when the party was insolvent, and on the very eve of absconding to avoid his creditors. In *Wilson v. Day* (c), the party was insolvent at the time of the assignment; it was executed under very fraudulent circumstances, to protect, and prefer, a favourite creditor; and only a few days before the bankrupt absconded. In *Compton v. Bedford* (d), the bill of sale was, in like manner, executed under the impression of an immediate insolvency, to give a preference to favourite creditors, and the very day before the party absconded. These are all the

material cases, except that of *Law v. Skinner*, which shall be mentioned afterwards. In the present case, the defendant could not have taken possession of the estate, or goods, under the indenture, at any one time, prior to the commission. If he had, the estate might have been recovered from him by *Jackson*, in ejectment, and the goods in trover; for the court will not permit a trustee to keep possession [92] against his *cestuy que trust* (e). It may be said, that the leaving *Jackson* in possession gave him a false credit. But will it be contended, that his credit would have been worse, if the transaction had been publicly known? If Mr. Hoare, the banker, were to make an assignment of all his property to secure the payment of 20*l.* would such an act, when known, hurt his credit, or make him a bankrupt? The circumstance of the amount of the debt in proportion to the property is what affects credit, not the amount of the security. As to the case of *Law v. Skinner* (f), it was decided on a principle which certainly is not law; for the Chief Justice is there made to say, that the question turned upon this, "Whether the deed did not, *ipso facto*, create an insolvency in the trader? that, if so, it was clearly an act of bankruptcy (g)."—(Lord Mansfield,—"You are right; a man may be insolvent, without being a bankrupt; and a man may become a bankrupt, and yet be able to pay 25*s.* in the pound. The reason why a man becomes a bankrupt, who conveys away all his property, is, that he thereby becomes totally incapable of trading.")—Here, the proviso would have prevented the defendant from entering or taking possession at the time of the execution of the indenture;

(a) *B. R. H.* 31 *Geo.* 2. 1 *Burr.* 57.(b) *C. B. H.* 10 *Geo.* 3. 3 *Wilsf.* 47.(c) *B. R. T.* 32 & 33 *Geo.* 2. 2 *Burr.* 57.(d) *Guildhall*, after *H.* 2. *Geo.* 3. *coram* Lord Mansfield, 1 *Blackst.* 362.(e) *Infra*, p. 695.(f) *C. B. E.* 15 *Geo.* 3. 2 *Blackst.* 996.(g) 2 *Blackst.* l. c. 997.

1779.

DEVON
against
WATTS.

ture; therefore the defendant could not have stopped *Jackson's* trading. To hold him to have become a bankrupt by the assignment, the court must decide, that the defendant could have taken possession under it. But he could not. If he had, it would have been a tortious act, and he would have been liable to be sued for it, as such, by *Jackson*.

Nares, for the plaintiffs,—The Master of the Rolls declared a pretty strong opinion, that the assignment, in this case, was an act of bankruptcy, and the Chancellor gave no opinion to the contrary: he only expressed doubts on the subject. *Jackson*, at least, owed 100*l.* to the petitioning creditor at the time of the assignment, and that conveyance certainly tended to delay *him* in the recovery of his just debt. The instant *Jackson* failed in the payment of the bond-debt to Mrs. *Barilom*, the defendant had a right to take possession under the assignment. *Law v. Skinner* was the solemn and unanimous decision of the court; and this is to the full as strong a case as that was. There, the bankrupt continued in credit near two years after the assignment. A conveyance of part of a trader's property may be fair; a conveyance of the whole must be against the statute.

Bower, in reply, contended, that the execution of the assignment must have been an act of bankruptcy, at the time when it took place, or could not become so afterwards.

Lord *Mansfield*,—I have endeavoured to find out where there can be a doubt in this case. A fraudulent disposition of a trader's property is void against his creditors; and, if it is done by deed, it is by force of the statute of *James* an act of bankruptcy. In the present case, the assignment is by deed; and what has the trader done by that deed? Why, to secure the defendant against the consequences of being surety for him,

he conveys a copyhold estate, and all his goods, furniture, stock, &c. to the defendant. He enumerates the goods specifically, and in detail, and gives a sham possession, by delivering a spoon. It has been settled, over and over, that, if a trader makes a conveyance of all his property, that is, instantly, an act of bankruptcy. It is fraudulent: it destroys the capacity of trading. In this case, *Jackson* could not fairly sell an ounce of merchandize after the assignment. The whole belonged to another man. It was a fraud in *Jackson* to deal with any body as a trader. There is another ground. By the assignment *Jackson* defeated every other creditor. The petitioning creditor was deprived of the benefit of an action. There was nothing left for him to take in execution, if the deed was valid. But it may be said to have been void against creditors, and that the goods might still have been taken in execution, under the statute of Queen *Elizabeth* (b). If so, it was fraudulent, and therefore an act of bankruptcy, under the statute of *James*. It makes no difference that *Simpson* was not a creditor at the time. It was a preference to him, when he should become a creditor. Another thing: it does not appear that *Simpson* applied for, or knew of, the assignment. *Jackson* sent for the attorney, who, I think, blundered. If he had only made a conveyance of copyhold estate, it might have made a difference; though I give no opinion on that head. After the number of cases that have been decided, I can have no doubt. We must not always rely on the words of reports, though under great names. Mr. Justice *Blackstone's* reports are not very accurate.

Willes, *Ashurst*, and *Buller*, Justices concurred in opinion with his Lordship. The *posse* to be delivered to the plaintiffs.

The cause, I believe, has never since come on in the court of Chancery, for farther directions.

Vide also *Butcher v. Eagle*, M. 1779. Geo. 3. *infra*, p. 282.

(b) 13 *Eliz.* c. 5.

1779.

COGHLAN *against* WILLIAMSON.Monday,
8th Feb.

IN an action of debt upon a bond, tried before Lord Mansfield, on a plea of *non est factum*, it appeared, by the bond, that the subscribing witness was one *Steele*. He was not produced, but the plaintiff proved that one *Steele* had gone to the *East-Indies* about five years ago as a *cadet*, in a ship in which the defendant was purser. Enquiries had been made after him, and it did not appear that he had ever returned. *Webb*, a captain in the *East-India* Company's service, said he was in the trading way in *India*. The plaintiff had applied to the defendant to settle the bond, when the defendant offered to pay 80*l.* immediately, and to settle the rest of the debt, with interest, at the end of the year. The plaintiff refused to agree to this proposal, upon which the defendant said, that he could not recover, for the bond was executed on shipboard, and that he could not get the witness. The defendant's hand-writing was proved, and also a receipt, and subscription to a bond to the *East-India* Company, by *Steele*.—Upon this evidence, Lord Mansfield directed the jury to find a verdict for the plaintiff; and, now, upon shewing cause against a rule for entering a nonsuit, the question, Whether, under the above circumstances, the evidence of the defendant's hand-writing was admissible? came on to be argued by the Solicitor General and Davenport, for the plaintiff, and Dunning and Morgan, for the defendant. But the counsel for the defendant thought it was impossible for them, after the admission by the defendant, as above stated, to support the rule.

In an action on a bond, if the defendant's admission of the debt is proved, and that the subscribing witness cannot be got, it will be sufficient to prove the defendant's hand-writing.

The rule discharged, with costs [C].

[C] Vide *Lord Ferrers v. Shirley*, when the subscribing witnesses reside there, are made evidence in *Great Britain*, on proofs of the hand-writing of the parties and of the witnesses. *B.R.H. 4 Geo. 2. Fitzg. 195, 196. Gould v. Jones, Tr. 2 Geo. 3. Law of N. Pr. 236. By 26 Geo. 3. cap. 57. § 38. bonds and deeds executed in the East Indies,*

1779.

Tuesday,
9th Feb.BOYCE *against* WHITAKER.

If the defendant undertake to set forth the statute of 23 H. 6. c. 9. in a plea to a sheriff's bond, a misrecital is fatal.—If the replication conclude with a verification, it will be bad, upon special demurrer.

THIS was an action of debt on a bail-bond, brought by the plaintiff, as assignee of the sheriff of *Kent*. The defendant prayed oyer of the bond and condition, and set forth the condition, which was in the usual form and then *pleaded*, "That, before the making of the writing obligatory aforesaid, to wit, by a certain act made in a parliament of the said Henry the 6th, held at *Westminster*, in the county of *Middlesex*, on the 25th day of *February*, in the 23d year of his reign, it was, among other things, enacted, by the authority of the same parliament, that no sheriff, under-sheriff, sheriff's clerk, steward, or bailiff of franchise, servant of bailiff, or coroner, should take any thing by colour of his office, by him, nor by any other person, to the use of any person, for the making of any return, or panel, and the copy of any panel, but fourpence. And that the said sheriffs, and all other officers and ministers aforesaid, should let out of prison all manner of persons, by them, or any of them, arrested or being in their custody, by force of any writ, bill, or warrant, in any action personal, or by reason of indictment by trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons let to bail, or mainprize, to keep their days in such place as the said writ, bills, or warrants, should require; such person or persons which were or should be in their ward by condemnation, execution, *capias utlegatum* or *excommunication*, surety or the peace, and all such persons which were or should be committed to ward by special commandment of any justices and vagabonds refusing to serve according to the form of the statute, labourers only excepted. And that no sheriff, nor any of the officers or ministers aforesaid, should take, or cause to be taken, or make any obligation, for any cause aforesaid, or by colour of their office, but only to themselves, of any person which should be in their ward by the course of the law, but by the name of their officers, and upon condition written, that the said prisoners should appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants, should require. And if any of the said sheriffs, or other officers or ministers abovesaid, take any obligation in other form, by colour of their office, that it should be void, as by the same act, among other things, more

1779.

BOYCE
against
WHITAKER.

fully appeared :” That the defendant was arrested at the said time of making the said writing obligatory, (6th July 1778,) by the sheriff of Kent, on a *pluries latitat* returnable on *Wednesday* next after three weeks of the *Holy Trinity* (1778), and that the sheriff, upon that arrest, took bail, the writing obligatory aforesaid, with the condition aforesaid, for *ease and favour* to the said defendant of his imprisonment by the said sheriff shewn, and to have and obtain his deliverance therefrom; which said writing obligatory the said sheriff took by *colour of his office*, against the form of the statute aforesaid.—The plaintiff replied, that the defendant, before the return of the writ in the declaration mentioned, to writ, on the day of the date of the bond, viz. 4th July 1778, as bail for his appearance at the return of the writ, sealed, and, as his act and deed, delivered, the bond, in the manner in the declaration mentioned, *without this*, that the said sheriff, upon the arrest of the defendant in the plea mentioned, took bail, the writing obligatory aforesaid, with the condition aforesaid, for *ease and favour* to the defendant of his imprisonment by the said sheriff shewn, in manner and form, &c. and “*this the said defendant is ready to verify*.”—To this replication the defendant demurred; and shewed for cause, “That the replication, denying the whole substance of the plea, concluded with a verification, and to the court; whereas it ought to have concluded to the country.”

Baldwin, for the defendant, contended, that this case was within the reasoning and general principle laid down in *Trapaud v. Mercer* (v), viz. “that, wherever there is an affirmative and a negative, the conclusion ought to be to the country. He said, that the plea and replication were analogous to the pleas and replications in actions on the statutes against gaming and usury; and that, in those cases, the replication always concludes to the country. He also cited, as in point, a case of *Asb. v. Walker*, which had been determined in this court last term.

Morgan, for the plaintiff, insisted, 1. That the conclusion of the replication was right. 2. That the plea was bad, and therefore at all events the plaintiff would be entitled to judgment. 1. As to the first point, he cited *Foden v. Haines* in *Carthew* (w), where, although there was a demurrer to a replication like the present, and which concluded with a verification [10], no objection was made on

(v) T. 33 & 34 G. 2. 2 Burr.

1022.

(w) B. R. E. 6 W. & M. Carth.

100.

[10] It is not stated, either in *Carthew* or *Camberbatch*, that the replication, in

that case, concluded with a verification. Morgan inferred that it did, probably because of the traverse; but, although it is a general rule that a traverse must conclude with a verification, yet it may, and, when it comprises

1779.

BOYCE
against
WHITAKER.

on that ground; and he observed, that, by the report of the same case in *Comberbatch* (x), the court is stated to have said, that the plaintiff should have alleged, that the bond was *pro bono et vero debito*, and then *traversed* the case and favour. He also cited *Lenthal v. Coke*, in *Saunders* and *Siderfin* (y), where the replication was exactly similar to this, concluding with a traverse of the case and favour, and a verification; and yet, on a special demurrer, the present objection was not made. He mentioned also a precedent of the same sort in *Ashton's Entries*, title *Debt* (z). 2. He argued that the plea was bad on two accounts. In the first place, because the statute of *Hen. 6.* was mis-recited, there being two variances, viz. "indictments by trespass," instead of "indictments of trespass" and "*capias utlagatum*" instead of "*capias utlagatum*." In the second place, he said, the plea was bad, because it averred matter *dehors* the deed, contradictory to the condition; for the condition stated the bond to have been taken for the defendant's appearance, and the plea averred it to have been for ease and favour; that, if the condition had been for the payment of money, ease and favour might have been averred, because that might not have been inconsistent. He cited, on this head, 5 *Com. Dig.* 224. *Cock v. Ratcliffe*, *Cases temp. Hardwicke*, 287. and *Collins v. Blantern* (a), [11].

Baldwin, in reply, observed, as to the conclusion of the replication, that, in none of the cases cited by *Morgan*, the concluding with an averment had been assigned as a cause of demurrer. With regard to the mis-recitals of the statute, he said, if it is a public act, the court would

prizes the whole substance of the plea, it ought to conclude to the country [† 40]; *Haywood v. Davies*, 1 *Salk.* 4. pl. 10. *Robinson v. Railey*, 1 *Burr.* 316.

(x) *Comb.* 245.

(y) *M.* 20 *Car.* 2. 1 *Saund.* 156. 1 *Sid.* 383.

(z) *Ashton*, 266, 267.

(a) *C. B. E.* 7 *G.* 3. 2 *Willf.* 352.

[11] That case was an action on a bond, conditioned for the payment of a sum of money. The defendants pleaded, after setting forth the condi-

tion, that it was entered into as an indemnification to the plaintiff for a note which he had given to a person to bribe him not to appear as a witness on an indictment. The plaintiff demurred generally; and it was argued, that this was an averment of matter *in pais*, *dehors* the deed, and therefore bad; but the court over-ruled the demurrer, on the ground that the deed was void *ab initio*. *Morgan* must have cited this case therefore by way of anticipation, and to distinguish it from that before the court.

[† 40] In *Mulliner v. Wilkes*, *B. R. E.* 23 *Geo.* 3. cited *infra*, p. 414. *Buller*, Justice, said, there is no case where it has been held, that a traverse with an inducement should not con-

clude to the court; and that, therefore, that was the safest way. [†] Vide *Hedges v. Sandon*, *B. R. E.* 28 *Geo.* 3. 2 *Term Rep.* 439.

would not take notice of them, and, if a private act, the plaintiff ought to have replied "*nul tiel record*" [† 41].

LORD MANSFIELD said, that, if the defendant had unnecessarily set out the act of parliament, which it seemed to him he had, he would hold him to half a letter [12]; [13] and that, as to the other objection to the plea, a bond taken for the defendant's appearance at the return of the writ, could not be for ease and favour, and, therefore, the condition and averment in the plea were inconsistent.

BULLER, *Justice*, thought there was no doubt but the conclusion to the replication was bad, and the whole substance of the plea was denied; but that it was unnecessary to look beyond the plea, which was clearly bad. He said there were many cases where the word "*aforsaid*" had been held to tie the party up to an exact recital, and the plea here concluded that the bond was taken "*against the form of the statute aforsaid.*"

Judgment for the plaintiff.

[† 41] In the case of *Rex v. Wilde*, B. R. M. 21 Car. 2. 1 Lev. 296. which was the information under a private act of parliament, after verdict for the prosecutor, on the plea of "not guilty," a motion was made in arrest of judgment, because there was a mistake in setting forth the commencement of the parliament. The answer given was, that, being a private act, the court could not take notice of the mistake, on that motion, as it did not appear on the record, and that the defendant ought to have pleaded *nul tiel record*; but the court held that they were bound to take notice of the commencement, prorogations, and sessions of parliament. It seems to follow from that case, that misrecitals of private acts in other respects can only be taken notice of by the court, when there is a plea of *nul tiel record*. *Vide*, to that effect, *Platt v. Hill*, B. R. M. 13 W. 3. 1 *Ld. Raym.* 381. 1 *Salk.* 330.

[12] Lord Mansfield asked, if there was any doubt whether the statute was

a public act, and *Davenport*, as *amicus curie*, said it had been doubted, and was therefore always set out.—It is recited in the case of *Lentball v. Coke*, and also in *Dive v. Maningham*, *Florod.* 60. [14] But in *Samuel v. Evans*, B. R. T. 28 Geo. 3. 2 *Term Rep.* 569. the court held clearly, that it is a public act, and therefore said that they would take notice of it though not pleaded. *Qu.* Whether the same act may not be public as to some clauses, and private as to others? *Vide Rex v. London*, T. 3. W. & M. Skinn. 293. 294.

[14] *Vide S. P.* ruled as to the statute of *Scandalum Magnatum*, 2 Ric. 2. cap. 5. in *Lord Cromwell's Case*, B. R. T. 20 Eliz. 4 Co. 12. b. and *Viscount Say and Seal v. Stephens*, B. R. M. 4 Car. 1. Cro. Car. 135. and, as to this very statute of 23 Hen. 6. in *Trussel v. Aston*, B. R. M. 30 El. Cro. El. 108. *Vide also Holby v. Bray*, B. R. H. 19 & 20 Car. 2. 1 *Sed.* 356.

1779.

BOYCE
against
WHIT-
KER.

1779.

Tuesday, 9th
Feb.

When there is in a bond and also a deed of covenant to secure an annuity, although the bond is forfeited before a discharge under the insolvent act of 16 Geo. 3. c. 38. the party may be sued upon the covenant, for payments becoming due after the discharge.

* [98]

COTTEREL *against* HOOKE.

IN an action of covenant, the plaintiff declared, That, in consideration of 240*l.* paid by him to the defendant, the defendant, by an indenture, bearing date the 7th of July 1767, had covenanted, that he would pay the plaintiff an annuity during his life, of 40*l.* a year, at four quarterly payments, and that 60*l.* of the annuity became in arrear on the 7th of April 1778. The defendant prayed *oyer* of the deed of covenant, which was set forth, and by which, after reciting that, for the better securing * the annuity, the defendant had executed a bond to the plaintiff, bearing even date with this deed, in the penal sum of 400*l.* he assigned to the plaintiff, for his farther security, a salary of 50*l.* which he enjoyed as one of the clerks to the auditor of impress, and *covenanted to pay the annuity by quarterly payments.* He then prayed *oyer* of the bond, which was set forth, and also of the condition, which was also set forth, and was, That, if the defendant should pay the annuity at the regular quarterly payments, and should perform all the covenants in the indenture bearing even date with the bond, then the bond should be void. He then pleaded, 1. That the plaintiff ought not to have any execution against the defendant, *other than against his real estate, his money in the funds, or his money lent upon real security only,* because the indenture of covenant which he had set forth, and that mentioned in the condition of the bond, were one and the same; that the bond and deed of covenant were both given to secure one and the same annuity; that, after the execution of the deed of covenant, and the bond, and before the 22d of January 1777, mentioned in the act, &c. (the insolvent debtor's act of 16 Geo. 3.) (b). viz. on the 7th of January 1776, 20*l.* for two quarters of the annuity became due, and was not paid according to the tenor and effect of the said bond, whereby *the said bond became forfeited,* and the penal sum became due and owing to the plaintiff, and that, before the first day of January 1776, the defendant was arrested, and in actual custody of an officer of the sheriff of *Middlesex*, and held to bail by virtue of a bill of *Middlesex*, and that he surrendered himself in discharge of his bail, and was, thereupon, committed to the prison of the *King's Bench*, before the 26th of June 1776, in the said act mentioned, viz. on the 17th of May 1776, and continued there till the time of his discharge, and that, at the general quarter sessions of *Surry*, held, by adjournment, on the 29th day of July 1776, he was discharged, according

according to the form and effect of the said act; and concluded with a verification, and prayed judgment if the plaintiff ought to have any execution against him, *other than against his real estate, &c.* 2. That, before the 22d of January 1776, viz. on the 8th of December 1775, he was arrested, &c. (stating the arrest, surrender, and discharge, as in the former plea), *That the indenture on which the plaintiff had brought his action was dated and made, and all debts thereupon owing, and accruing, from the defendant to the plaintiff, were contracted, and occasioned, before the 22d of January 1776, to wit, on the 7th day of July 1767, and this, &c.* wherefore he prayed judgment whether the plaintiff ought to have any execution, *other than against his real estate, &c.* The plaintiff demurred generally to each of the pleas; and the case came on to be argued this day, by *Wood* for the plaintiff, and *Bolton* for the defendant.

(By the statute of 16 Geo. 3. c. 38. § 41. it was enacted, "That the future real estates, as well freehold and copyhold, as customary copyhold, or money in the funds, or lent upon real security of persons discharged under the act, should remain liable to their respective creditors, and that execution might be sued out against such real estate, or money in the funds, *but not against their person, or other personal estate*").

Wood, for the plaintiff, contended, that, supposing the bond to have been forfeited before the discharge, and *that* security gone, yet that did not destroy the other security by the deed of covenant, and that the plaintiff had his election to proceed on either, as he pleased. He said, the only question was, Whether the insolvent debtors' act discharged the payments of annuities, which became due after the discharge? The words of the statute are, "That no person to be discharged by this act, shall be imprisoned by reason of any judgment or decree obtained for payment of money only, or for any debt, damage, contempt, costs, sum or sums of money contracted, incurred, occasioned, owing, or growing due, before the said 22d day of January 1776" (c). But the word "*occasioned*" must be considered as applied only to "*contempt*," otherwise the insolvent would be discharged from contingent debts, which is not the case even of a bankrupt who has obtained a certificate. "*Owing and growing due*," mean, in the above clause, the same as "*grown due*," which is manifest from a subsequent section (d), where the persons discharged are authorised to plead, to any action brought "*for any debt, sum, or sums of money due before the 22d of January 1776*," that such debt or sum "*of money, was contracted, or due, before the said 26th of January*."

1779.
COTTEREL
against
HOOKER.

[99]

(c) *sect.* 33.

(d) *sect.* 36.

1779.

COTTEREL.
against
HOOKS.

*[100]

"January." At any rate, the words "growing due" can only extend to the quarter's payment, which was accruing on the 26th of January, for by § 34. it is expressly provided, that no persons shall, by the act, be discharged of debts subsequent to that * date. Where an annuity is secured, (as in this case,) by a deed of covenant, a bankruptcy does not discharge future payments; although, if the only security is a bond, which has been forfeited before the bankruptcy, a court of equity, in favour of the creditor, will allow him to consider the penalty as a debt, and to prove the value of the annuity. He cited, to prove that the remedy under a deed of covenant is not taken away by a bankruptcy, *Fletcher v. Bathurst, Viner, title Creditor and Bankrupt (e)*. He also mentioned *Webster v. Bannister*, which was a case in this court, last term (f). Such an annuity at this, was, he said, clearly a contingent debt, because, unless the party live, it never can become due; that the last insolvent act of 18 Geo. 3. c. 52. was decisive on the question, for that a new clause was introduced into that act, (§ 30.) to relieve the grantors of annuities (who have been fugitive beyond seas) when discharged under it, from the accruing payments of such annuities; that this clause was a legislative exposition of the former acts, for it recited, that, without such express provision, such persons could not have the benefit of the act, (which in its other provisions resembled the former ones,) in respect of the accruing payments of annuities.

Bolton, for the defendant, said, that all *Wood's* argument applied only to the second plea, but that *his* objection to the action was, that both the bond and covenant were entered into to secure the same annuity, and that the bond having been forfeited, the penalty had become a present debt, under which the plaintiff might have received a dividend; that he admitted this case was not within the statute of the 7th of Geo. 1. c. 31. relative to bills, bonds, notes, and other securities to be paid at a future day, but that on the forfeiture, the penalty having become a present debt, the discharge under the act had relieved the defendant against the payment of the annuity; that, as to the case of a bankrupt, there was no doubt; that the point had been solemnly decided by the court of *Common Pleas*, in *Perkins v. Kempland (g)*, which case he read from a note lent him by GOULD, Justice; that, if there was a difference, the case of an insolvent debtor was more favourable, because a bankrupt is considered as a criminal; that the same facts were now before the court as if an action had been brought on

(e) T. 9 G. 1. *Viner*, vol. 7. p. 71.(g) C. B. T. 16 Geo. 3. Since reported, 2 *Blackst.* 1106.(f) *Vide infra*, E. 20 G. 3. p. 393.

on the bond, for that the deed purported to be given for the *father* securing the same annuity for which the bond was given. He also cited a case of *Raincock v. Freemantle* in this court about six years ago, where an insolvent debtor who had been discharged, gave a note for a debt which had accrued before his discharge, and it was held to be void [† 42].

Lord MANSFIELD stopped *Wood* from replying.

His Lordship said, the question was, Whether, when there was a bond with a penalty, and also a deed of covenant, and the plaintiff made no use of the penalty, he should be barred of his remedy under the deed of covenant? That he took the case of a bankrupt and insolvent debtor (as to this point) to be the same. That when a man has two remedies, he may elect. That if the plaintiff had made use of the penalty, the case would have been different; but that, as he had not, he might proceed as often as he pleased for breaches of the covenant.

BULLER, *Justice*, said, that here were two pleas, one of which (the second) was upon the deed of covenant. That, if the covenant had been the only security, nothing had happened to bar it. That the other plea stated the bond conditioned for the regular payment of the annuity. That the court could not, because such a bond appeared to have been given, determine the other security to be void.

Judgment for the plaintiff [† 43].

[† 42] I have not been able to find that case, and, in the case of *Best v. Barber*, B. R. M. 23 Geo. 3. which arose on the insolvent act of 1781, the contrary was expressly determined. As it had been in the case of a bankrupt, in *Trueman v. Fenton*, B. R. H. 17 Geo. 3. *Cowp.* 544. See

also the same doctrine confirmed in *Cockshott v. Bennett*, B. R. M. 26 Geo. 3. by Lord Kenyon, 2 Term Rep. 763. 765. *Vide Ex parte Burton*, *Canc.* 1744. 2 Atk 255.

[† 43] *Vide Wyllie v. Wilkes*, M. 21 Geo. 3. *Infra*, p. 519.

WILKINS and Others, Assignees of BROOKE, a Bankrupt, against CARMICHAEL.

Thursday,
11th Feb.

THIS was an action of *trover*, brought by the assignees of a bankrupt, for a ship, of which the bankrupt was owner, against the captain. The case was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after M. 19 G. 3. (b). The defence set up was, that the captain had a lien on the ship for his wages, and for stores, provisions, and repairs. A verdict was found for the plaintiffs with 605 *l.* damages, subject to the opinion of the court,

A captain of a ship has no lien upon the ship for wages, stores, or repairs done in England.

on

(b) Thursday, 10 December 1778.

1779.

WILKINS.
against
CARMIL-
CHUEL.

*[102]

on a case, which stated as follows:—"That the defendant being the captain of the ship *Africa*, mentioned in the declaration, bespoke and directed repairs to be done to the ship, before she set out upon her last voyage, and likewise * directed her to be supplied with stores and provisions, for which repairs, stores, and provisions, the defendant was liable as well as the owner. That the defendant likewise had wages due to him. That *Brooke*, the owner of the ship, became a bankrupt, and, after the bankruptcy and the demand (of the ship) therein after mentioned, the defendant paid the creditors their bills for stores and repairs. That the plaintiffs (the assignees) demanded of the defendant to deliver the ship to them, which he refused, without having an allowance in his account for his wages, and the money he was liable to pay for the bills before mentioned."—The question, on the above facts, as stated for the opinion of the court, was, "Whether, in this action, the defendant could be allowed to retain, and have deducted out of the damages which ought to be given for the value of the ship, the several sums mentioned in the case, or any of them; or whether any of the above articles were so far a lien on the ship as to justify his refusal to deliver the ship to the plaintiffs without being paid? If the court should be of opinion that the defendant had a lien on the ship for any of his demands, a nonsuit to be entered. But, if they should think that any of his demands ought to be deducted out of the damages for the value of the ship, then such money to be deducted out of the money recovered by the verdict, and the *posse* to be indorsed accordingly."

The case was argued, on Friday, the 5th of February, by *Davenport*, for the plaintiffs, and *Baldwin*, for the defendant.

Davenport argued, 1. That, as to the captain's wages, it is settled that they are no lien upon the ship. This is clear from the case of *Clay v. Sudgrave* (i), in *Salkeld* [1], and

(i) *B. R. T. 12 W. 3. 1 Salk. 33. S. C. by the name of Clay v. Snelgrave, 1 Ld. Raym 576.*

[1] By the statute of 15 Ric. 2. c. 3. it is enacted, that the Admiralty court shall have no jurisdiction of contracts arising by land, yet it is permitted to mariners to sue for their wages in the court of Admiralty. In the case of *Clay v. Sudgrave*, as reported by *Salkeld*, Lord *Holt* is made to say that this is expressly against the statute, but that *communis error facit jus*. Surely it is not consonant to legal principle to hold that any usage or common error

can abrogate a statute to any purpose, or give legality to what an act of parliament expressly prohibits. After the case of *Clay v. Sudgrave*, the statute of 4 Ann. c. 16 § 17. puts suits in the Admiralty court for seamen's wages very clearly, though by implication, upon a legal footing, for the words of that section are, "That all suits and actions in the court of Admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue."

and confirmed by *Bayley v. Grant* (k), in the same book. But if he has no lien for his wages, he can much less claim any lien for any other demand, as repairs or stores; the wages being more closely * connected with the ship, than any other demand, as they are the consideration for the work which is done in the ship, and is absolutely necessary to her earnings. The different tradesmen, as the shipwright, biscuit-baker, butcher, &c. could not have justified the detention of the ship, if she got into their possession, and the derivative creditor for their demands cannot have a better right than them. As to repairs done in England, it was expressly determined in the case of *Watkinson v. Barnardiston* (l), that they are no charge upon the ship. 2. If the captain cannot justify the detention, neither can he be entitled to any allowance out of the damages. A mutual account cannot be settled by a sort of equitable set-off in an action of *trover*. To permit it would be a dangerous innovation in the law. Here, indeed, the defendant's demand is such as could not have been set off in an action which admits of setting off mutual debts, because he was only liable to pay, at the time of the demand and refusal, but had not actually paid. If he were to be allowed for what he was only liable to pay, it may prove a great detriment to the bankrupt's estate, because the captain may afterwards refuse, or be unable, to pay, and then the tradesmen will come upon the estate of the bankrupt.

Baldwin insisted, that the workman who repairs a ship has a lien upon it. This appears from a case *Ex parte Shanks and others*, in *Atkyns* (m), which was determined against the shipwright, on the particular ground of his having delivered up the possession of the vessel. Probably, in the case of *Watkins v. Barnardiston*, the possession had been, in like manner, relinquished. If the workman has a lien, it seems to be just, that he should be able to transfer such lien with the possession, to the captain, who is liable to pay him. An action could be maintained by the workman against the captain, although he had not given the orders. This must be on the ground, that the workman has parted with the possession of the ship, which he might have detained as his security, to the captain. It would therefore be highly unreasonable, if he could not secure himself by retaining the ship.—On a question from the court, he said, *he did not know of any case* where it had been determined that a captain is liable for repairs, if he has not ordered them. As to the general doctrine concerning liens, he cited a case *Ex parte Deeze* (n), and *Greene v. Farmer* (o), and

1779.

WILKINS
against
CARMICHAEL.

*[103]

(k) B. R. T. 12 W. 3. 1 Salk. 33.
8. C. 1 Ld. Raym. 632. 12 Mod. 440.

(l) *Canc. T.* 1725. 1 P. Will. 367.

(m) 1754. 1 Atk. 234.

(n) 8 June 1748. 1 Atk. 228.

(o) B. 8 Geo. 3. 4 Burr. 2214.

1779.

WILKINS
against
CARMICHAEL.

[105]

and said there could be no reasonable distinction in respect to liens between one sort of tradesmen and another, between carriers, taylor, &c. and ship-carpenters. If a coachman is sent to the country on a job, with his master's coach and horses, and he lays out money in repairing the carriage and feeding the horses, he may detain them till he shall be paid. A captain can certainly detain the cargo till the *freight* is paid, and it would be inconsistent that he should be bound to part with the ship, when he is not bound to part with the goods. The case is not different from what it would have been, if the owner had continued solvent, because assignees take, subject to all equitable liens and demands against the bankrupt. For this, he cited *Brown, Assignee of Williams, v. Heathcote & al. (p)*.

Davenport, in reply, contended, that the possession of the captain is merely that of a servant, to whose skill and fidelity the owner entrusts his ship, and that the captain does not, thereby, acquire any qualified property. The owner may pledge the ship, although the captain is in possession of her, but the captain cannot, at least, he can only hypothecate her abroad, and that from the necessity of the case, because no personal security can be given. It would be absurd, if the owner were to change the captain, to suppose that the former captain could retain the ship, and prevent the voyage, till his account should be settled. He denied that a captain is liable for repairs, which he has not ordered.—Lord MANSFIELD having asked, whether if a ship is sent to dock, the shipwright may detain her, till he is paid? He answered, that it is the practice not to receive a ship into a dock, unless they are satisfied that the owner is a good paymaster, which seemed to shew that they do not look to the ship as a security.

Baldwin had instanced the case of attorneys, who cannot be compelled to deliver up the deeds and papers of their clients, till they are paid; upon which Lord MANSFIELD said that the practice, in that respect, was not very ancient, but that it was established on general principles of justice, and that courts both of law and equity have now carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him, till his bill is paid [13]. Sir *James Burrow* mentioned to the court, that the first instance of such an order in this court, was in the case of one *Taylor of Evesham*, about the time of a contested election for that borough; and Lord MANSFIELD said, he himself had argued the question in the court of Chancery.

The

(p) 22 Oe. 1746. 1 Atk. 160.

And, *Welsh v. Hole*, M. 20 Geo. 3[13] *Vide Rex v. May, infra*, E. 19 p. 226.

Geo. 3. p. 193, 194. Note [26]

The court took time to consider.

LORD MANSFIELD, now, (after stating the case,) delivered the opinion of the court, as follows.

LORD MANSFIELD,—Notwithstanding the strongest inclination that the defendant should have satisfaction, before the value of the ship is paid over by him, we are not able to find a ground upon which we can give judgment in his favour. 1. He has set up a lien upon two sorts of claim, *viz.* wages; and stores and repairs. As to wages, there was no particular contract, that the ship should be a pledge; there is no usage in trade to that purpose; nor any implication from the nature of the dealing. On the contrary, the law has always considered the captain as contracting personally with the owner: on this ground, prohibitions have been granted; and the case of the captain has, in that respect, been distinguished from that of all other persons belonging to the ship. This rule of law may have its foundation in policy, and the benefit of navigation; for, as ships may be making profit and earning every day, it might be attended with great inconvenience, if, on the change of a captain, for misbehaviour, or any other reason, he should be entitled to keep the ship till he is paid. As to stores and repairs, it is a strong answer to that claim, that when the demand was made by the assignees, the captain had not paid. But, if there was any lien originally, it was in the carpenter. The captain could not, by paying him, be in a better situation than his, and *he* had parted with the possession, so that he had given up his lien, if he ever had one. The other creditors had none. If the defendant is liable to the tradesmen, it is by his own act. Work done for a ship in England, is supposed to be on the personal credit of the employer. In foreign parts, the captain may hypothecate the ship. The defendant might have told the tradesmen that he only acted as an agent, and that they must look to the owner for payment. 2. If there is no lien, can there be a set-off? This was no *item* of any sort in account between the bankrupt and the defendant. The ship remained in *specie* till after the bankruptcy; and the conversion arises from an act done on the specific property of the assignees, not of the bankrupt.

The *possea* to be delivered to the plaintiffs [† 54].

[† 44] *Vide Rich v. Gee, B. R. T. 17 Geo. 3. Cowp. 636.*

1779.

WILKINS
against
CARMICHAEL.

1779.

Friday, 10th
Feb.SULLIVAN *against* MONTAGUE.

A certificate under 19 Geo. 2. c. 34. or 4 Geo. 3. c. 15. may be granted at a period subsequent to the trial, and out of court.—Matter of defence arising after the action brought, may be given in evidence, if it happen before plea pleaded, in cases where the special matter may be given in evidence under the general issue.—The time of plea pleaded is to be reckoned from the entry of the plea on the record, not from the time of its being delivered to the plaintiff.

THE defendant, being captain of a man of war, on the *Quebec* station, had seized a trading vessel of which *Sullivan* was the master and owner, as a smuggler. Upon an information brought in the *Vice-Admiralty* Court at *Quebec*, sentence was pronounced against *Sullivan*; whereupon he appealed to the superior court of *Admiralty* at *Halifax*, where the sentence was reversed. On the defendant's return to *England*, *Sullivan* brought the present action of trespass in this court; and the trial coming on before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*, and the fact of the trespass being proved, the defendant produced the record (a) of the proceedings on the appeal in the court at *Halifax*, on which was indorsed a certificate of the judge of that court, that there was a probable cause of seizure. The sentence of the court at *Halifax* bore date in *May* 1776. The certificate indorsed upon it was dated thirteen months later, viz. 21 *June* 1777, which was posterior to the commencement of the present action.

The counsel for the defendant insisted, that this certificate was a bar to the action, and that the plaintiff must be nonsuited.

For the plaintiff it was answered, that the certificate ought to have been made at the time when the sentence was pronounced.

The jury found a verdict for the plaintiff, with 1800*l.* damages, but subject to the opinion of the court as to the effect of the certificate.

The trial had once been put off upon an affidavit on the part of the defendant, that an application had been made to the judge at *Halifax*, to certify, at the time of the reversal of the original sentence, and that the judge then said he would certify whenever he would be required. Between the time when that affidavit was made, and the actual trial of the cause, the certificate had been obtained.

In the last term, the *Solicitor General* having obtained a rule to shew cause why a nonsuit should not be entered, two questions were made: 1. Whether the certificate could have been granted even at the time when the sentence, on the appeal, was pronounced? 2. Whether it could be granted so long after sentence?

It was supposed, at the trial, and when the argument came on upon the rule to shew cause, by the counsel on both sides, that the certificate had been granted under the

16th

[107]

(a) i. e. a copy, by consent of the plaintiff.

16th section of the statute of the 19th of Geo. 2. c. 24. which consists of two branches. "1. In case any information shall be commenced and brought to trial, on account of the seizure of any ship as forfeited for illegally carrying goods, or of any wool, goods, wares, or merchandizes, as prohibited or uncustomed, or illegally carried or exported, or intended or attempted to be exported, or as illegally relanded after having been shipped or exported upon deponenture or certificate, wherein a verdict shall be found for the claimer thereof, and it shall appear to the judge or court before whom the same shall be tried, *that there was a probable cause of seizure*, the judge or court before whom the said information shall be tried, shall certify on the record, that there was a probable cause for the prosecutor's seizing the said ship or goods; and in such case, the defendant shall not be entitled to any costs of suit whatsoever, nor shall the persons who seized the said ship or goods be liable to any action, indictment, or other suit, or prosecution, on account of such seizure. 2. And in case any action, indictment, or other prosecution, shall be commenced and brought to trial against any person or persons whatsoever, on account of the seizure of any such ship, or of any wool, goods, wares, or merchandizes, as prohibited or uncustomed, or as illegally carried or exported, or intended or attempted to be exported, or illegally relanded as aforesaid wherein a verdict shall be given against the defendant or defendants, if the court or judge before whom such action or prosecution shall be tried, shall certify on the said record, that there was a probable cause for such seizure, then the plaintiff, besides his ship or goods so seized, or the value thereof, shall not be entitled to above two-pence damages, nor to any costs of suit, nor shall the defendant in such prosecution be fined above one shilling."

DUNNING, and Lee, shewed cause; and it being urged, that the above clause in the statute of Geo. 2. was confined to Great Britain, and the court being of that opinion, and thinking, also, that it applied only to cases where there had been a trial before a jury and a verdict, the case stood over, in order to see whether any subsequent act had extended this provision for granting certificates to the Admiralty courts in America.

At the trial, the Solicitor General had applied to Lord MANSFIELD to certify under the second branch of the clause, but his Lordship refused, being of opinion that the case was not within it, for that it only related to cases where there had never been a condemnation [† 45].

When

[† 45] Vide *Rennals v. Cooper*, that a judge may certify, under that B. R. E. 22 Geo. 3. where it was held second branch of the clause, though there

1779.

SULLIVAN
against
MON-
TAGUE.

[108]

1779.

SULLIVAN
against
MON-
TAGUE.

When the argument came on again, (which it did in the same term, viz. *M. 19 G. 3.*) it appeared, that by a clause in the statute of *4 Geo. 3. c. 15.* the 16th section of *19 Geo. 2.* is expressly extended to *America*, and to cases where there has either been a verdict, or sentence (a).

Dunning, for the plaintiff, still insisted, 1. That the certificate could not be granted upon an appeal; and, 2. That it could only have been granted at the time when the sentence was pronounced.

The *Solicitor General*, on the other side, said, as to the first point, that there were no words in the clause of the statute of *4 Geo. 3.* to exclude the judge in an appellate jurisdiction from granting certificates; and that it would be extraordinary indeed, if a person who had taken a ship which had never been condemned, might be protected by a certificate, and yet that another, who had such good ground for seizure as to obtain a sentence in his favour, should have no such protection, if that sentence was, afterwards, reversed. As to the second point, he observed, that there were no words in the statute requiring the certificate to be made in open court; that, by the statute of *4 Ann. c. 16, § 5.* the judge is authorized, where there have been several matters pleaded, to certify whether there was probable cause; but there being no express words requiring this to be done in court at the trial, the court of *Common Pleas* had determined, that it might be done after an application had been made for taxing the costs; *Creeger v. Dent.* (b); that, where the legislature meant the certificate to be made at the time of the trial, it is so expressed, as in the case of special juries (c).

Lord MANSFIELD delivered the opinion of the court; 1. That the judge in the appellate jurisdiction had a power to certify, so that the words and meaning of the statute of *Geo. 3.* were, that, wherever a sentence was pronounced, the judge might certify. That a contrary construction would be attended with the absurdity stated by the *Solicitor General*. There could be no certificate in the original court, because the sentence was in favour of the defendant, and it

there has been no information brought in the *Exchequer*, for the condemnation of the ship.

(a) *4 Geo. 3. c. 15. § 46.*

(b) *E. 24 G. 2. Barnes 141. 4to ed. 1772.*

(c) *24 G. 2. c. 18, § 1.* "Unless the judge before whom the cause is tried, shall immediately after the trial certify in open court, under his hand, upon the back of the record, &c." [† 46].

[† 46] A certificate under 8 & 9 *Will. 3. c. 11. § 4.* that a trespass was wilful and malicious, made out of court, has been determined to be void (*Ford v. Parr, C. B. E. 28 Geo. 2. 2 Will.*

21.) though the words of that statute are not so strong as those of *24 Geo. 2. c. 18.* nor indeed so strong as the report in *2 Will.* makes the court state them to be.

it would be strange indeed if he were to be in a worse situation than if that sentence had been against him. 2. That the certificate might be granted after the trial. That there were no words confining it to the time of the trial, and the case on the statute of 4 *Ann.* was a strong authority on this point. That the case of a sentence by a court of *Admiralty* was stronger than that of a verdict at law, because the verdict is entered, and completed, immediately, but the sentences in the *Admiralty* court are often not drawn up for months after they are pronounced.

His Lordship said, the rule for entering a nonsuit must be made absolute.

But *Dunning* having raised a new objection, viz. that, as the certificate did not exist at the time of the commencement of the action, it could not be taken advantage of on the general issue, but ought to have been pleaded, this question stood over, till *Saturday* the 28th of *November*, the last day of *Michaelmas Term*, when it was argued, by *Dunning*, for the plaintiff, and the *Solicitor General*, for the defendant.

As the argument, on this point, turned upon the times, and dates of the proceedings, it will be proper to state them. The action was commenced in *February* 1777. The declaration was of *Easter Term* 1777. The plea was delivered on the 10th of *June* 1777, but was not entered of record till *Hilary* 1778. The certificate, as has been already mentioned, bore date the 21st of *June* 1777.

For the defendant, it was said, by the *Solicitor General*, that the present question came before the court in a very unfavourable light, for that it amounted to this, whether there had been, by the fault of those concerned for the defendant, such an omission in pleading, as should, in the present state of the cause, render him liable to the amount of 1800 *l.* which in reality he was not bound to pay? But that, even at the trial, if the objection had been made, it could not have prevailed; or, if it could then, it now came too late. That it was a general rule, that, whatever takes away the right of action, although it arise after the commencement of the suit, provided it happen *previous to plea pleaded*, may, in cases where special pleading is necessary, be *pleaded in bar*, without saying in the plea, *that* it happened after the bringing of the action; and, in cases where the special matter may be given in evidence, may be taken advantage of on the general issue; *Bird v. Randal* (a). That, by the statute of 4 *Geo* 3. (b), the defendant, here, was entitled to give the special matter in evidence. That it would have been impossible to plead the certificate at the trial, in this case, *puis darrein continuance*, because,

1779.

SULLIVAN
against
MONTAGUE.

[110]

(a) *M.* 3 *Geo* 3. *B. R.* 3 *Burr.* 1344. (b) § 47.

1779.

SULLIVAN
against
MON-
TAGUE.

on looking to the record of the plea, and comparing it with the date of the certificate, it would have appeared, that the matter of defence had arisen before the plea, which was the last continuance on record. That the plea had indeed been *delivered* before the date of the certificate, and that it was in the plaintiff's power, who made up the record, to have entered it, either of the term preceding, or the term subsequent to, the delivery; but that, having entered it of the term subsequent, and the certificate having been granted in the interval, he could not now be permitted to say the certificate was posterior to the date of the plea, as appearing on the record, and as he himself had put it there. That, in actions against executors, if judgments are confessed, after the declaration, and before the plea, the practice is to plead them in bar, not *puis darrein continuance*. That there had been a case very lately before HOTHAM, Baron, in *Kent*, where a certificate, granted after issue joined, was permitted to be given in evidence. That, if it were true that the certificate ought, in strictness, to have been pleaded, yet, as no objection had been made on that ground at the trial, and the certificate, which was then, *in fact*, given in evidence, proved that the plaintiff had no right to recover, the court would not suffer him now to profit by a mere slip in point of form.

Dunning, on the other side, insisted, that Lord MANSFIELD had given the defendant leave, *generally*, to move for a nonsuit, without saving any particular point; and therefore, every objection was now as open to both parties as they would have been at the trial. That, at that time, all concerned thought the only act on the subject was the statute of 19 Geo. 2. That, as to the argument that this could not be pleaded *puis darrein continuance*, that depended on the fact, whether the matter arose previous to, or since the last continuance. But that his ground was, that, in all events, it ought to have been *pleaded*; if before the last continuance, in bar; if after it, then *puis darrein continuance*. He appealed to the court, and the bar, whether it was not a general rule, that a fact, which if it had happened before the commencement of the action might have been given in evidence, must be pleaded if it arise after the action is brought; and said it was every day's practice, in actions of *assumpsit*, to *plead* a release, when obtained after the commencement of the suit, although it is to be given in evidence, when *prior*. That the reason was plain, because, by the general issue, a defendant asserts, that, at the time of commencing the suit, some reason existed which should have prevented the plaintiff from bringing the action. That, if the defendant should now prevail, the plaintiff would be charged with costs, for a reason which had no existence when he brought his action. That, by plead-

ing

[111]

ing the certificate, the defendant would have given the plaintiff an opportunity of taking the opinion of the court, on the point disposed of on the former argument, without the expence of a trial.

The court seemed all to agree, that matter happening after the beginning of the suit, but before plea pleaded, might be given in evidence; but WILLES, *Justice*, expressed with great earnestness his doubts, whether the time of plea pleaded ought not to be reckoned from the time when the plea was actually delivered, the date on the record being a mere fiction. Lord MANSFIELD observed, that supposing the rule to be as WILLES, *Justice*, conceived it, both parties had been guilty of a slip; the plaintiff in not objecting to the evidence at the trial; the defendant in not pleading; and can the court (he said) decide that the plaintiff shall be relieved against the one, and the defendant caught by the other?

The case stood over.

And now, his Lordship, (after stating the facts and dates,) delivered the unanimous opinion of the court, to the following effect:

Lord MANSFIELD, — The question made at the trial was, Whether the Judge of the court of *Halifax* could certify, *after the cause was over*? That was the point saved. If the court should be of opinion that the certificate was a bar, a nonsuit was to be entered. The question was fully argued last term, and we were all of opinion, that the certificate was a bar to the action. After that opinion was delivered, a motion was made to support the verdict, and on grounds entirely new. For it has been objected that the certificate ought not to have been read at the trial; 1. Because it did not exist when the action was brought; 2. Because it did not exist at the time of plea pleaded. This was no part of the question meant to be submitted to the court, yet the plaintiff was fully apprized of the certificate before the trial, and a copy of it was read by consent. The only way in which we could let the plaintiff have the advantage of the present objection, would be to grant a new trial; but, in that case, the defendant must be let in to plead the certificate. This alone is decisive. But, to go farther. If the objection had been made at the trial, we think it could not have prevailed. *Actio non* goes, in every case, to *the time of pleading*, not to the commencement of the action [† 47]. In the present instance, the

1779.

SULLIVAN
against
MON-
TAGUE.

[112]

[† 57] *Vide Reynolds v. Beerling*, B. R. M. 25 Geo. 3. where, it was determined on a demurrer, that a judgment obtained by the defendant, a-

gainst the plaintiff, after the declaration was delivered, and before plea pleaded, may be pleaded as a set-off, and *that*, although it do not appear that the

1779.
SULLIVAN
against
MON-
TAGUE.

general issue is given by statute, and that leaves every defence open which the defendant might otherwise have by special pleading. The certificate is dated the 21st of June 1777, and the plea was actually delivered on the 10th of that month, but the plaintiff made up the record, and entered the plea of *Hilary* 1778. We think he could not have been let in at the trial to contradict the record. Legal fictions, and relations, can never be contradicted, to prevent justice, and let in mere objections of form and regularity [† 48]. If a writ is *teste'd* the last day of a term, you cannot say it issued in the vacation, for the purpose of making it void, though you may shew when it really issued, if the justice of the case required it [13]. But, here, the plaintiff himself made up the record. Shall he be admitted to aver against his own act, by which he has misled the defendant? By so doing, he said to the defendant, "In-
stead of pleading this matter, you may give it in evidence." One case was mentioned at the bar, in which a certificate granted after issue joined, was admitted in evidence; but it is said that no objection was made. There is great reason for considering the certificate, in cases like this, as granted *nunc pro tunc*; but, without giving any opinion, now, on that point, as the objection was not made at the trial, as it would not have availed if it had been made, and as the defendant, if it were to prevail now, must be let in to plead; we are all of opinion that the rule for a nonsuit ought to stand.

[113]

The rule made absolute.

the cause of action on which the defendant's judgment was obtained, was prior to the commencement of the plaintiff's action. But, in *Evans v. Proffer*, B. R. E. 29 Geo. 3. 3 Term Rep. 186. it was determined, that a plea of set-off, that the plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; and that it should state that he was indebted at the commencement of the action; and *Buller*, Justice, said, that on looking into the

case of *Reynolds v. Beerling*, he found, that on the point here stated, it could not be supported.

[† 48] *Vide* *Moslyn v. Fabrigas*, B. R. M. 15 Geo. 3. Cowp. 161. 177.

[13] *Vide*, to this purpose, *Rex v. Mann*, Scacc. 13 Geo. 1. 2 Str. 749. *Johnson v. Smith*, B. R. E. 33 Geo. 2. 2 Burr. 950. cited *supra*, p. 62. Note [† 30]. *Morris v. Pugh*, B. R. M. 2 Geo. 3. 3 Burr. 1241. cited, *supra*, *ibid*.

The End of HILARY Term 19 GEORGE III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Nineteenth Year of the Reign of GEORGE III.

1779.

Ex parte COLE.

COWPER moved, on the part of *Cole*, who had formerly been an attorney of this court, and had, at his own desire, been struck off the roll, and was then called to the bar, that he might be again put on the roll of attorneys. The court refused to comply with the application, there being no instance of a barrister being admitted an attorney. They said, he ought first to have applied to his society to be disbarred [† 49].

Wednesday,
21st April.

If an attorney is struck off the roll on his own application, and afterwards called to the bar, the court will not give him leave to be again put upon the roll of attorneys.

[† 49] *Vide Moody's Case, C. B. T.*
16 Geo. 2. *Barnes, quarto* ed. p. 42.
where an attorney, having, at his own instance, been struck off the roll, and having been put into the commission of the peace, and made a commissioner of

the land tax, and having moved to be restored, on an affidavit, setting forth his reasons, the motion was granted, he consenting to take no advantage of any action pending, if there should be any.

RICHARDS' (*qui tam, &c.*) against BROWN.

THE plaintiff having sued the defendant in an action for usury, and having obtained a verdict, and judgment, in this court, the defendant brought a writ of error, in the House

A variance between the name of the attorney in the warrant and in the declaration.

declaration may be amended by altering the name in the warrant to that in the declaration, in a penal action, after error brought and the variance assigned for error.

1779.
 RICHARDS
 against
 BROWN.

[115]

House of Lords, and assigned for error, that the attorney who had appeared on record for the plaintiff had no warrant from him. In the last term, pending the writ of error, the plaintiff obtained a rule to shew cause why the judgment roll should not be amended, by striking out the name of "*Robert Mayes*," in the plaintiff's warrant, and inserting that of "*John Stapleford*."

Davenport now shewed cause, and contended, that there is no instance of such an amendment being made after error brought, especially in a penal action, unless where the plaintiff in error has been guilty of *laches* (a). Even the omission of the Christian name of the attorney, in the warrant, has been held to be bad, and to make it no warrant (b). A warrant of attorney must be entered, which cannot be done after error brought; as was decided in a case in *Dyer*, T. 6 Eliz. (c). To alter both the Christian name and surname of the attorney in this case would be making a new warrant.

The *Solicitor General*, for the rule, contended, that the distinction where there has been *laches* on the part of the plaintiff in error, has no foundation in reason, and that the cases cited by *Davenport* were decided on grounds which go to the discretion, not the power of the court. In a case in *Moore* (d), an amendment was allowed in the name of the attorney, after error brought; and in the case of *Henriques v. The Dutch West India Company* (e), it was determined that a warrant of attorney may be entered at any time, *pendente lite*. As to this being a penal action, since the mistake was merely in form—the blunder of a clerk—he did not conceive that could make any difference [17]. In *Sedgwick v. Richardson* (f), it was held, that penal actions are within the statute of 32 Hen. 8. c. 30. and that a discontinuance in such an action is, by force of that statute, cured after verdict; and in *Philips v. Smith* (g), which was a penal action, a mistake, in the addition of the defendant, in the warrant of attorney, was amended after error brought. *John Stapleford* is the name in the memorandum

(a) *Dyer* 180. pl. 48.

(b) 1 Roll. Abr. 289. (H). pl. 3.

(c) *Dyer* 230. b. pl. 3.

(d) *Heley v. Rigs*, *Moore* 711.

(e) B. R. T. 2 G. 2. 2 Stran. 807.
 2 Ld. Raym, 1532.

[17] In *Goff* (*qui tam*, &c.) v. *Popplewell*, B. R. M. 29 Geo. 3. 2 Term Rep. 707. the court said, there was no difference between civil and penal actions as to amendments at common law.

But as the action (for usury) had been depending four years, they would not permit the sums and dates in the declarations to be amended, as it would, in effect, amount to leave to bring another action, after the time limited by law was expired.

(f) C. B. T. 5 W. & M. 3 Lev. 374.

(g) B. R. M. 5 G. 1. 1 Stra. 136.

randum of the declaration, according to which the amendment may be made [1]

1779.

RICHARDS
against
BROWN.

The rule made absolute.

(1) In the case in *Moore*, the attorney was called, in the warrant, *John Keeling*, and, in the declaration, *William Keeling*, and the amendment made was to alter *William* to *John*. The court allowed the amendment, on the ground, that, by intendment, the warrant of attorney is antecedent to the declaration. The present case was just the reverse; and, if there is any weight in that reason, it rather made against the amendment in this case. In *Short v. Coffin*, *Exr. B. R. E.* 11 [116] *G. 3. (b)*, the court amended a judgment by changing it from, "*de bonis propriis*," to "*de bonis testatoris si, &c.*" after error brought, and an argument in the

Exchequer Chamber [C]. In *Tully v. Sparkes (i)*, on a writ of error in the Exchequer Chamber, it was assigned for error, on a judgment, on a demurrer to the plea, that the damages *occasione detentionis debiti* were not said to be awarded *ex assensu suo*; and *Pengelly*, Chief Baron, having some doubts whether the case was within 16 & 17 *Car. 2. c. 8. § 1.* the court of *B. R.* was moved, and amended the judgment in the original record, and, the transcript being afterwards amended, the court of Exchequer Chamber affirmed the judgment. *Vide infra, Rex v. Lyme Regis*, on the prosecution of the Hon. *Henry Fane*, p. 135.

(b) 5 *Burr.* 2730.

B. R. E. 27 *Geo. 3. 1 Term Rep.*

[C] And even after the record has been sent back from the Exchequer Chamber. *Green v. Bennett*,

782, 3.

(i) 2 *Str.* 867. 869. 2 *Ld. Raym.* 1570, 1571.

The KING against WAVELL and Others.

Saturday,
24th April.

THIS was a rule to shew cause, why a rate for the relief of the poor of the parish of *Effingham*, in the county of *Surry*, and an order of sessions confirming the rate, should not be quashed, on the ground, that the parties applying for the rule were over-rated and over-charged. The court of quarter-sessions had refused to state a special case, but the counsel for the appellants being of opinion that the rate would appear to be bad from the title, they removed it, by *certiorari*, into this court, and obtained the present rule. The title of the rate was as follows:

A rate cannot be made to repay money borrowed to repair and rebuild a workhouse.

"*Surry*, to wit. An assessment on all and every the occupiers of lands and houses, in the parish of *Effingham*, for the necessary relief of the poor, and towards payment of money borrowed for repairing and rebuilding the workhouse."

The objection being stated to be, that, upon this title, the rate appeared to be made for a purpose not within the statute of 43 *El. c. 2. viz. towards payment of money borrowed, &c.* *WILLES, Justice*, observed, that the ground, in the rule, was only, that the parties were over-rated and over-charged, and seemed to doubt whether, upon a rule so

1779.
The KING
against
WAVELL.

[.117]

worded, the court could go into the jurisdiction, or right to rate; but the *Solicitor General* answering, that they were *over-rated*, and *over-charged*, to the amount of that part of the sum assessed which was to be applied to the repayment of the money borrowed, the counsel in support of the rate proceeded to shew cause against the rule.

Dunning, *Lade*, and *Rous*, for the rate—The *Solicitor General*, and *Mingay*, on the other side.

In support of the rate, it was contended, that it was unnecessary to have said more in the title, than "*A rate for the relief of the poor*," and that the acts and orders of magistrates, (except convictions,) are entitled to every intendment from the court, that can support them, and, therefore, the court would intend the whole money to have been assessed for the first purpose expressed in the title, if it should be thought that the order was not within the statute, and would reject the additional words, as surplusage. If the present objection was founded in law, the proper method of getting at it would have been, by an appeal from the allowance of the overseers' accounts. However, this purpose, of building or repairing a workhouse, was manifestly within the spirit of the statute of *Elizabeth*, since it would be in vain to provide for the sustenance of the poor, without being able to furnish them with a lodging. It did not appear, on the face of the rate, but that the money might have been borrowed *within the year*, and, therefore, it was incumbent on the persons complaining to shew that a rate cannot be made for the repayment of money borrowed for building a workhouse within the year. There is a clause in the act (*g*), authorizing the parish-officers to build houses on the waste for lodging the poor, and directing the money for that purpose to be levied in the same manner as what is before (*b*) directed to be raised for the relief of the poor; and such power in the parish-officers is clearly recognized and confirmed by subsequent statutes (*i*).

On the other side it was said to be a general rule, without exception, that parish-officers cannot *borrow* money for any purpose whatever. The inconvenience of vesting such an authority in them was manifest; for new inhabitants might be called upon to pay money borrowed before they became parishioners, and for purposes from which they could derive no benefit; in order, for instance, to repay money employed in building a workhouse, which may be fallen to ruin at the time of making the rate. It was determined in *Tawney's Case* (*k*), that there is no power to re-imburse

(*g*) § 5.

(*b*) § 1.

(*i*) 9 *Geo.* 1. c. 7. § 4.

(*k*) *H.* 2. *Ann.* 2 *Ld.* *Raym.* 1509.

2 *Salk.* 531. 6 *Mod.* 97. *S. P. Rex v. Churchwardens of Rotherhithe*, *M.* 11 *G.* 1. 8 *Mod.* 339.

re-imburse an overseer for money he may have advanced on account of the parish; that he can only do it himself by a rate made within his year *for the relief* of the poor. It was impossible that the court should intend that the rate was not made for the very purposes expressed on the face of it, by the persons who made it. The court should not suppose, that no part of this rate was for the money borrowed, or consider *that* part of the title as surplusage. In the case of *Rex v. Rebow* (1), the rate was both for the house and the tolls, and the counsel, in support of the rate, contended, that, as the house was clearly rateable, the court, if they should be of opinion that the tolls were not, would intend that the whole was assessed for the house, rather than quash the rate; but the court would not listen to this argument [2]. The present objection would not have been competent, on an appeal from the allowance of the overseers' accounts; for in such case, nothing can be objected, but that the money has not been applied to the purposes for which the rate was made.

Lord MANSFIELD absent.

WILLES, *Justice*,—Can we reject as surplusage what is a material part of the title of the rate? If we cannot, is a rate, to repay money borrowed, good? *Tawney's Case* is in point to this, that a rate cannot be made for the express purpose of re-imbursing an overseer for money advanced by him, even within his year. As to an appeal against the overseers' accounts, is a parishioner to be obliged to pay money, and to be turned round, in that manner, to get it back, if levied without authority? The rate cannot be supported.

ASHHURST, *Justice*, of the same opinion.

BULLER, *Justice*,—This rate imports to be made for two purposes, and we are desired to consider it as only made for one. I conceive, that a rate cannot be made for money borrowed, even though within the year. *Tawney's Case* goes that length; for it is not confined to the *mandamus*. If it were otherwise, the inconvenience might be very great.

The rule made absolute.

(1) *M. 13 Geo. 3. Bott Append. 384.*

[2] By the report of the case in *Bott*, (*loc. cit.* p. 386.) Lord Mansfield is made to say, "They have not rated the house, they have rated the tolls;" and it is expressly stated in a manuscript note which I have, that the

court observed, that it was not set forth in the case, that *Rebow* was rated for the house, but only for the tolls. There is probably, therefore, some inaccuracy in the account here given of the argument in that case.

1778.

The KING
against
WAVELL.

[118]

1779.

Tuesday, 27th
April.• COCKSEGE *against* FANSHAW.

On a demurrer to evidence, every fact which the jury could infer, in favour of the party offering it, from the evidence demurred to, is to be considered as admitted.—A corporation having a customary duty on corn imported, it is a good custom, that factors free of the corporation shall receive to their own use, that part of the duty which arises from corn consigned to them as factors.

“FROM time immemorial, there hath been paid, to the corporation of *London*, for their use, a toll or duty of one farthing on the quarter of corn, by all persons, not being free of the city, importing corn into *London*, or the liberties thereof, coastwise, eastward of *London Bridge*, except from the *Cinque Ports*, or the county of *Kent*.” Freemen are exempt from this toll; and such freemen as are corn-factors claim a right to have the duty collected on all corn consigned to them in *London*, to be sold on account of their correspondents, although such correspondents be not freemen, returned to them. The corporation insist, that they are entitled to retain the duty paid for such corn, the property of strangers, though consigned to freemen-factors. To try this question, the present plaintiff, being a freeman-factor, brought an action for money had and received to his use against the defendant, who was the city officer who had collected the duty on a quantity of corn consigned to the plaintiff, but which was the property of a non-freeman. The cause was tried, at *Guildhall*, before Lord MANSFIELD, at the Sittings after *Trinity Term*, 16 Geo. 3. when a verdict was found for the plaintiff. In *Michaelmas Term* following, the defendant obtained a rule for a new trial, and, on the day for shewing cause, Lord MANSFIELD reported the evidence, in effect, as follows:

The counsel for the plaintiff called,

Benjamin Green, who said he had been an officer of the customs 46 years: he had particularly known the toll of the farthings, from the year 1729, to the year 1751. During that time, they were always returned, when the corn belonged, or was consigned to, freemen. He remembered they were always returned to Sir *John Thomson*, and to Alderman *Nelson*.

John Fisher, aged 75, said, he had been in the corn-trade for 50 years. The farthings had always been returned to him as a factor. He had been clerk to Sir *John Thomson*, and always understood the exemption to extend to freemen as factors.—On his cross examination, he said they always charged the farthings to their correspondents.

William Anderson's evidence was to the same purpose. He said, he had been a clerk to Alderman *Nelson*, who never dealt on his own account, but solely as a factor. That *Nelson*'s dealings were to a great amount, for that he sometimes sold 5000 quarters in a day, and he always had the farthings returned.

William Read, clerk to the defendant, said, at first, that the farthings were never allowed to factors, and that he would not have allowed them if the persons claiming had declared that the corn was consigned on commission. But, on being pressed, he acknowledged that he never knew the question asked, whether the person claiming the farthings was, or was not, a factor. He knew *Nelson* to be a factor, and had returned the farthings to him, to the amount of 100 *l.* in a year. When the demand of a return of the farthings was made, the freeman making the demand used to write thus (in what is called a certificate), "*for your humble servant,*" or, "*on account of your humble servant.*" He knew that nineteen out of twenty parts of the corn sold in *London*, was sold by commission, and he knew of no instance where freemen had paid the duty. He had known the duty amount to 1100 *l.* in a year, but it was now reduced to 200 *l.*

Richard Reed said he was clerk to Messrs. *Wear* and *Taylor*, corn-factors. They had always paid the duty, before they took up their freedom, and never since. On proof of their being freemen, the farthings had always been returned, without further enquiry.—On his cross-examination, he said, they always charged the farthings to their correspondents, in this manner; "*for the farthing,*" and not paid for the farthings."

There was no evidence produced on the part of the defendant.

His Lordship said, he had told the jury, that the whole depended on the usage: that the factors charging their correspondents the farthings did not amount to a decisive acknowledgment, that the city was entitled to them. It might raise a question between them and their employers. The practice of selling by commission, may have been as ancient as this duty; and, if in the original grant of the duty, there was an exemption as to all corn consigned to freemen, such exemption would be good.

Wallace, *Bolton*, and *Buller*, shewed cause against the new trial.—They contended, that the evidence was irresistible. The reason of the exemption, at first, might have been to encourage freemen to become importers of corn, or to induce men to purchase the freedom of the city. It was not true, as had been urged, at the trial, that such an exemption was as broad as the grant; for *non-freemen* might import corn, either on their own account, or as factors; and they, in either case, must pay the duty.

Glynn, Serjeant, *Dunning*, and *Davenport*, in support of the rule for a new trial, observed, that, if the plaintiff's claim were to succeed, the duty, which, according to *Read's* evidence, had already sunk from 1100 *l.* a year to 200 *l.* would very soon be reduced to nothing. Some of

1779.

COCKSEGE
against
FANSHAW.

[131]

1779.

COCKSEGE
against
FANSHAW.

the certificates read at the trial stated, in explicit words, that the freeman had the property of the corn in him, for the expression made use of was, "*being mine,*" or, "*being my property.*" It was clear the collector had understood them all in that sense. The exemption claimed would amount to a breach of the oath taken by all freemen of London, viz. "Ye shall colour no foreign goods under, or in your name, whereby the king, or this city, might or may lose their customs or advantages." By "*foreign goods,*" in the oath, were meant the goods of non-freemen, and the attempt of the plaintiff was to colour such goods, whereby the city would lose its customs. At all events, the plaintiff could not maintain this action, for the money paid for the farthings by the captain of the vessel in which the corn had been imported, if to be returned at all, must belong to the consignee, and was had and received to his use, not to the use of the consignee.

LORD MANSFIELD,—This is a matter of value, and the question is of importance; therefore the court will take time to consider of it. Independent of the oath, there is no doubt but that *colouring* goods would be a fraud. But the argument founded upon the oath turns in a circle. If the custom extends to factors, as well as to owners, then a person cannot be said to colour goods, unless he covers with his own name corn, which he is neither owner of, nor employed to sell as a factor. The words "*foreign goods,*" in the oath, certainly mean the goods of non-freemen. If a new trial is granted, it can only be, either on the ground of apparent fraud, or because such an exemption as is claimed by the plaintiff cannot be supported by any usage. To say this, would be to decide the cause completely against the plaintiff; whereas, if we should not grant a new trial, the city of London will not be concluded by the present verdict. They will only have the disadvantage of a recent verdict against them, in case they should try the question again in another action.

[122] ASTON, Justice,—By the statute of 1 Hen. 8. c. 5. (m), it is enacted, "That no citizen of London, or other the king's subjects inhabiting within the Cinque-ports, or any other being free of prisage or butlarage of wines, by grant, custom, or otherwise, custom no wines of any person or persons, not being free of any prisage or butlarage." By a charter of 1 Ed. 3. the king had granted to the city of London, "*Quod de vinis civium nulla pris fiat, sed perpetuè inde essent quieti.*" The object of the statute of Hen. 8. clearly was to prevent the abuse of that privilege. Now the words in the oath taken by freemen, have nearly the same import as to all goods, as those of the statute

statute have as to wines; and when we compare the words of the charter and of the statute together, it seems that none but freemen, for their *own* wines, are exempted from prisage. In the case of *The King & Waller v. Hanger*, reported in *Bulstrode (n)*, the question was, Whether the defendant, as executrix of a citizen of London, was exempted from prisage of wine which had belonged to the testator, and was shipped in his life-time, but not unloaded till after his death? There was no decision, the court being equally divided; but it is laid down by *Dodderidge*, Justice, (although he was of opinion with the defendant,) that, to be entitled to the exemption, the party must have the *whole* property (o). In the present case, therefore, if it stood clear of uninterrupted usage, I should think there would be a great deal in the objection. It is observable, that there are none of the notes or certificates which expressly and confessedly state the goods to have come to the parties as factors. The parole-evidence is, that the exemption *does* extend to freemen-factors. The point to be determined is, To what extent the constant usage has been carried? If there should be a new trial on that ground, the opinion of the court in granting it will not occasion any bias in the second jury.

1779.
COCKBIDGE
against
FARSHAW.

Lord MANSFIELD, on the day following, declared the opinion of the court as follows :

I left this question to the jury, on the foundation, that originally, the exemption *might* have been as to *all* corn consigned to freemen, either on their own account, or as factors. As there were no traces on the subject, in writing, the question for them to try was, Whether the usage had been such, as to warrant both the claims? The evidence of the usage was extremely strong. It appeared, that, for fifty years, the privilege had been considered as extending, *bonâ fide*, to both cases; and we cannot suppose, that, during that time, one half of the city were fools, and the other knaves. Witnesses swore that they always understood the exemption to extend to both cases. Several things which have been urged do not weigh with me against the usage; for instance, the argument drawn from the exemption relative to prisage, for the words creating that exemption expressly confine it to the wines of citizens—" *De vinis civium*." The oath proves nothing; because it still leaves the question to be, Whether this is *colouring* foreign goods, or not? The gradual diminution of the income from this duty is equally inconclusive. There has, of late, been a scarcity of corn in *England*, and a great deal has been imported from abroad, which is a thing formerly not known. Yesterday, after the argument,

[123]

(n) *B. R. H.* 12 Jac. 1. 3 *Bulst.* 1.

(o) *Loc. cit.* p. 17.

1779.
 COCKSEGE
 against
 FANSHAW.

ment, I resolved the question in my mind, on the nature of the claim, and the presumption upon which it must be supported; viz. that the exemption might have commenced with the grant; and it seemed to me next to impossible from the nature of the thing. It is an exemption in favour of citizens, from a duty granted to the city of London. Such an exemption must relate to something which a citizen must otherwise have paid. But that is not the case; for the citizen-factor would not have paid anything. If the citizen-factor were to take the benefit to himself, then the exemption would in truth operate as a grant, for the owner would have the duty to pay, and the factor would receive it, instead of the corporation. Either the freeman must allow the farthings to his employers, and then this would be an exemption in favour of owners not freemen, and consistent with the grant to the city, or else he is entitled to receive it for his own benefit, and then it is a grant to him. Therefore it strikes me as a thing which cannot be supported by way of exemption. This however is not an objection in point of law. It is matter to be left to a jury; for, if they find the exemption to have constantly existed in point of fact, it must operate as evidence of a grant. But this distinction not having been particularly pointed out to the jury on the last trial, it is proper that the cause should be reconsidered. Therefore we are all of opinion, that there should be a new trial.

The new trial came on at the Sittings after Michaelmas Term, 17 Geo. 3. when a verdict was again found for the plaintiff; and in Hilary term, 17 Geo. 3. a rule was obtained to shew cause, why the last verdict should not be set aside, and a third trial granted, which came on to be argued on the 6th of February 1777.

[124]

Lord MANSFIELD stated the evidence on the second trial as follows:

Benjamin Green said, that the duty was always repaid to freemen; and no questions were asked, whether the corn was their own, or only consigned to them as factors. He had known *Wormley*, who was receiver of the duty for a lessee of the corporation, from the year 1700, and he had told him that the practice was always to return the farthings. *Alderman Thomson* and *Sir Crispe Gascoigne* were known to be factors. and they had returned. The method was, that the factor came and said, "I am a corn-factor, there is the copy of my freedom, you will accept my bills, and return the farthings." The understanding of the officer was, that the factors, as such, were entitled to the return. He never knew of any suspicion of fraud or abuse.

Joseph

Joseph Fisher had known the trade 60 years; and, in addition to his evidence on the former occasion, said, that he had heard many old people talk of the privilege belonging to *free-factors*.

William Anderson and *Richard Reed* gave the same testimony as on the former trial.

All the plaintiff's witnesses said, that many factors had taken up their freedom for the sake of this privilege, and had paid the city 30 *l.* for it.

On the part of the defendant, the freeman's oath was read.

William Read, who was now produced on the part of the defendant, said, that since the matter had become a subject of dispute, they had understood the claim of exemption to relate only to corn which was the property of the freeman himself. However, nineteen out of twenty of the dealers in corn were factors, and so understood to be. There had been no dispute till the present. He had conceived the re-payment of the farthings to factors, as such, to be wrong, and had mentioned his sentiments to the defendant, and he to the corporation, which was the occasion of the present litigation.

One *Gimbert* said, he had been a factor 20 years, and a freeman part of the time. That he had been told, that if he were a freeman, he would be entitled to have the farthings returned, and yet to charge his employer for them. If he had not thought so, he would not have paid what he did, *viz.* 30 *l.* 10 *s.* for his freedom. *Wear* (p) had told him, that he thought they were all forsworn; but, two or three years afterwards, *Wear* became a freeman, and then he looked upon the exemption as his right. The witness could not say he was satisfied; and, after some time, he used to write in his certificates, "Receive such and such corn, from such a ship," without saying, "mine," or "my corn." He mentioned the truth to the corporation, but they made no difference, whether the certificates were in one form or another.

Many notes or certificates were produced, in which the words concerning the corn were, "*is mine*," "*belongs to me*," "*on my account*," "*for your humble servant*," and there were none which specified that the corn was consigned.

After having reported the evidence, his Lordship said:

For the plaintiff it was contended, that the usage was evidence of an original grant from the crown or parliament. That, in the original grant to the corporation, there might have been a proviso, that, whenever corn subject to the duty should be consigned to free-factors, they should

1779.

COCKSLEDGE
against
FANSHAW.

[125]

1779.
 COCKSEGE
 against
 FANSHAW.

should be entitled to receive the farthings to their own use. That, if there was any doubt whether that could be the origin of the exemption, it might have arisen from a subsequent grant by the city to the free-factors, or an agreement between the city and them. I told the jury, that the ground on which we had granted a new trial was, an intrinsic objection to the exemption; that the practice might have commenced in fraud, and yet have been carried on fairly afterwards; that it must have been an exemption as to factors, in the original grant to the city, or an original grant to the factors; that there could be no exemption, unless in favour of persons otherwise liable; but here the factor would not have been liable, but the owner, and *he* was not exempted. As to its being a grant, I told them, I had never heard or read of such an instance as a grant to factors; but that this was matter of evidence; I did not know of any law against such a grant; and, upon the whole, I left it to them to consider, whether they thought the usage coeval with the right of the city to the duty. Mr. *Wallace* suggested to me, that I had omitted the other ground, that the exemption might have originated in a subsequent grant from the city, or an agreement with them; but, thinking this origin less probable than the other, I said no more to the jury.

Wallace, Bolton, and Buller, again shewed cause—*Dunning* and *Davenport* on the other side.

[126]

For the plaintiff it was urged, that no usage was ever so clearly established. There was no deception or fraud on the part of the factors, nor ignorance on the part of the city. The only ground left for the defendant was, the supposed impossibility that this usage could have a legal origin. But it might be considered as beneficial to the city, being an encouragement to the importation of corn, and there was nothing to hinder the crown from granting part of a duty to a corporation, and the rest to particular members of that corporation; nor was it impossible that the city, subsequent to the grant of the duty, might have agreed with the freemen-factors, that they should have the duty on corn consigned them. The temptation, which this would hold out to purchase the freedom of the city, was a reasonable inducement to such an agreement. In the case of *The Mayor and Commonalty of Linn Regis v. Taylor*, it was held to be a good custom, that freemen, being proprietors of ships, though not separately incorporated, might dig gravel in a manor which had been granted to the corporation (q); and, in a similar case;

a few

(q) *C. B. M.* 35 *Car.* 2. 3 *Lev.* 160. states the whole court to have held the custom good, it concludes that judgment was given for the plaintiffs. There must be some mistake in the report of this case; for, though it

a few years ago, it was ruled at *Nisi Prius*, that the resident freemen of *Newcastle* might claim an exclusive right in the town moor, against the members of the corporation at large. The objection, in the present case, arose, from confounding prescriptions and customs, the former of which must have a legal origin; but customs need not; *Gateward's Case* (r), *Viner, title Custom*, *Archer v. Bothenham* (s), *Day v. Savage* (t), *Potter v. North* (u). All customs vary from the common law, and the very idea of a custom is, that its origin cannot be traced. As to the supposition of fraud, the *onus* of proving lay upon the defendant, but there was as much reason to presume fraud against the duty, as against the exemption.

For the defendant, it was insisted, that the practice of the factors was nothing else but *colouring* the goods of non-freemen. All the notes held the corn out as the property of the factor. If the city did formerly know of the abuse, without correcting it, that was no reason why it should not now be corrected. While the frauds of the factors were kept within bounds, they were not inquired into, but as they had increased so much to the detriment of the city, it had become necessary to check them. No questions were asked of the factors, because the notes were contrived to answer the questions which might have been asked. The idea of an exemption, which was the only ground on the first trial, was abandoned on the second, as not capable of being maintained; but the supposition of the privilege claimed, being part of the original grant, was equally untenable, because the importation of corn into the city must have been of a much earlier date than the existence of factors. It was the interest of the corporation, that freemen should have an exemption for themselves, because this rendered it a desirable thing to purchase the freedom of the city; but it was not their interest, that the free-factors should be entitled to receive a duty on corn from other freemen, which would be, in substance, the case, if the plaintiff prevailed; because the owner would charge the farthing duty, which he must pay to his factor, in the price of the corn sold to other freemen, for their consumption. It was said, that, though factors might not be able to take by a direct grant, the city might, in trust for them; but the objection was, that no possible reason could be imagined for such a grant in their favour. Though a custom need not have a legal origin, it must not be unreasonable, which this was. The cases cited were not similar to the present. The *Newcastle* case had

1779.

COCKSEGE
against
FANSHAW.

[127]

(r) *C. B. H.* 4 *Jac.* 1. 6 *Cro.* 59. b.(s) *Hob.* 86.(t) *C. B. H.* 6 *Ann.* 11 *Mod.* 148.(u) 1 *Ventr.* 383. 386.

1779.
 COCKSEGE
 against
 FANSHAW.

had been compromised, but there was nothing unreasonable in a custom for resident freemen to have an exclusive privilege, in what *they* only could use. In that case, the resident freemen did not claim a right of putting on the cattle of *strangers*, nor did the freemen ship-owners, in the case in *Levinz*, set up a right to take ballast, in order to sell to other persons. The corn-factors are not admitted to their freedom under that description, but belong to any company in which they choose to be admitted,—(the plaintiff belonged to the Stationers' company.)—The main argument for the defendant was, that all the proof which had been, or could be, produced, could not out-weigh the internal evidence against the claim: and it could not, it was said, be fairly urged against the present application, that there had already been two concurrent verdicts; for they had been given on different grounds.

Lord MANSFIELD,—The question, in this case, is, Whether the freemen of *London* have a right to be exempted from the duty on all corn, whether consigned to them as factors, or their own property? If there is no distinction, the plaintiff is entitled to recover, otherwise not. On the first trial, I thought the evidence of the usage was very strong; and, as far as the memory of people living went, it was impossible to suppose there had been any fraud. The internal objection, (though it had been mentioned by the counsel on the first trial,) not having been particularly pointed out, by me, to the attention of the jury, it was thought proper that the cause should be re-considered. On the second trial, the usage has been proved more strongly than before; and there was no evidence that the city had ever received, to their own use, the duty on corn consigned to freemen as factors. It appeared, on the first trial, that the duty had diminished in its produce. There was no evidence of this on the last. The oath cannot avail the defendant, because the claim, whether well or ill-founded, is between the factor and his correspondent. He does not *colour* the goods. He takes the money to himself, and does not make a deduction in his account with his employer. As to the notes, whether they were fraudulent or not, must depend on the fact, whether the claim was or was not known. Now it was as notorious that the corn did not belong to the factors, as if the notes had expressly said so. Till this dispute, no questions were ever asked. The farthings were always returned to *Nelson*, who dealt so largely, and never but as a factor. Persons, who only dealt as factors, have paid 30*l.* for their freedom, in order to acquire this privilege. But the internal objection is, that the usage must have commenced in fraud some hundred years ago. This objection I cannot

[128]

not answer, and I left it to the jury in the strongest terms; but they have again found for the plaintiff. If I did wrong in leaving it to the jury, that would be a ground for a new trial. But I think I did right, and that this was not a subject for a special verdict, being merely a matter of evidence. If the jury thought there was evidence of a grant to the city, but that freemen should be exempted, and should receive a farthing a quarter on corn consigned to them as factors, I see no objection to it, in point of law. If we were to grant a third trial, we might as well grant a fourth and fifth. There would be no end. The city will not be concluded by the verdict.

1779.
COCKSEGE
against
FANSHAW.

ASTON, *Justice*,—This is a point of an uncommon nature, but the usage is very strong. The expressions in the notes may be reconciled to the truth. The only question now is, Whether the matter was fit to be left to the jury? If it was not, the last new trial ought not to have been granted. The court should have determined the cause. But I think the matter was proper for the decision of a jury, and that the evidence was sufficient in this cause—between a factor and the city-collector.

[129]

WILLES, and ASHHURST, *Justices*, of the same opinion.

The rule was accordingly discharged; but, the city not being satisfied, they still refused to return the farthings, and the plaintiff was obliged to bring another action. This second action coming on to be tried, at the Sittings after last *Michaelmas* Term, the evidence for the plaintiff was of the same sort and import, with what has been already stated, but more correct, explicit, and circumstantial. The defendant now demurred to the evidence; and, this day, the demurrer was argued, by *Davenport*, for the defendant, and *Wood*, for the plaintiff.

Davenport divided his argument into five points, or heads: 1. He contended, that, from the nature of a demurrer to evidence, and upon the evidence put on the record, the court, might, and ought to, disbelieve that the usage had been immemorial; 2. He then endeavoured to shew, that the claim, whether as founded on an exception or proviso in the original grant, or as a trust, or otherwise, could not have had a legal origin in respect of the persons of the claimants; 3. In respect of those who receive the duty; 4. In respect of those who pay it; Nor, 5. in respect of the nature of the duty itself.—1. As to the nature and effect of a demurrer to evidence, he said, he knew no difference between *that*, and a demurrer to pleadings, except that, in the case of the latter, you admit, at first, the truth of the facts pleaded; and, in the former, you first put the party on the proof of the facts. That, when the facts are proved, you deny, on a demurrer to evidence

1779.

COCKSEGE
against
FANSHAW.

[130]

as you do on a demurrer to pleadings, that the inference contended for, follows from the facts alleged. But he insisted, that although a demurrer to evidence admits the truth of all the particular facts, it does not admit the conclusions in point of *fact*, more than those in point of *law*, which the party offering the evidence contends for; so that, (as he conceived,) a demurrer to evidence may be maintained, even where there is some part of the evidence which might be left to a jury. This, he said, appears from the form of words used, which are, "that the evidence is not *sufficient* in law, to maintain the issue:" not, "that there is *no* evidence produced in support of "the issue." That, in this respect, the effect of such a demurrer differs from a special verdict, and that it may be used, where the party demurring is unwilling to trust the jury with the inference in point of fact. As authorities in support of this doctrine, he relied on what is said in the *First Institute* (v), in *Baker's Case* (w), in *Reniger v. Fogossa* (x), and on the precedents in *Rafall's Entries, title Evidence* (y); and he contended, that, according to the definition he had given, he was entitled to argue, that the particular facts sworn to, did not establish the general fact of an immemorial and uninterrupted allowance of the farthings to freemen-factors upon corn consigned to them, and not their own property. He urged, on this head, the appearances of fraud, in the various and ambiguous phrases and expressions which were used in the notes or certificates.—2. He said the usage, if in point of fact it had been immemorial, could never have had a commencement such as to establish a right in point of law, in respect of the persons claiming. It was now agreed, that the foundation of the claim must be considered as a grant; but freemen-factors were not persons capable of a grant. There was no such class of men existed till after the time of *Richard I.* There was no evidence of their existence at that period, nor was it possible; for the commerce of corn must itself have originated in later times. Corn-factors, even now, have no permanent character, and are not created by the city, by the crown, nor by any other legal authority, being the mere temporary creatures of their employers, who may destroy their existence when they please.—3. As to the persons receiving the duty, it was impossible, he said, to believe that there ever could be a legal commencement of an usage, by which the corporation of *London* were to become the trustees, or agents and collectors, for such a fluctuating and uncertain class of individuals. The city appoints, and pays the collector, and the factors do not at all contribute to the charges of the collection.

(v) *Co. Litt.* 72. a.(w) *B. R. T.* 42 *El.* 5 *Co. a.*(x) *M.* 2 *Edw.* 6. *Plowd.* 1.(w) *P.* 317. b. to 319. b.

collection.—4. As to the employers, who were to pay this duty, the same absurdity arose when *they* were considered, because it could not have been supposed that they would employ factors who were entitled, over and above the allowance paid them as such, to levy a duty upon the goods consigned to them. There was no consideration moving from the factors, to the owners, to entitle them to such a duty.—5. As to the nature of the duty, being a port-duty, and paid on account of the maintenance of the quays and harbour, he thought *that* was equally inconsistent with the idea of a grant to the free-factors, for there is nothing done by them to support, or benefit, the harbour. Upon the whole, he concluded, that the claim could never have had a legal commencement, but must have originated, either in fraud; or, at best, in mistake, by confounding the corn belonging to freemen who happened to act as factors, and that consigned to them on account of other persons.

1779.
COCKSEDGE
against
FANSHAW.

[131]

Wood, for the plaintiff,—1. Denied *Davenport's* definition of a demurrer to evidence, and insisted, that it admits all matters of fact which a jury *might* find, and only brings the decision, upon the inference in point of law from those facts, before the court. If it were otherwise, he said, a party might, in every case, take away the trial of the cause from the jury, and vest it in the court. The evidence of the usage was not only such as was to be left to a jury, as the court indeed had decided on the motions in the former action, and which was, on the present occasion, sufficient for the plaintiff, but was extremely strong and satisfactory. To say, whether the allowance constantly made to factors, was obtained by fraud, was directly and exclusively the province of the jury, but there was no pretext for supposing fraud.—2. He insisted, that the actual existence of the usage or custom being admitted by the demurrer, it was certainly such as might have a legal origin in various ways. If the crown, in the original grant of the duty to the city, had inserted a proviso to this effect, “but we will and ordain, that the freemen of the city of *London* shall receive to their own use, that part of the duty which shall arise upon corn consigned to them,” there was no doubt but that such a proviso would have been good, in law, to entitle them to such part of the duty. The king might have granted it, as an encouragement to them to import corn for the supply of the city. It is not at all an unusual thing for a particular part of a corporation to be entitled to rights or privileges to the exclusion of the rest, and to prescribe for them through the intervention of the whole body. This appears from the case of *Mellor v. Spateman*, in *Saunders* (z), where a burgess

(z) *B. R. M.* 21 *Car.* 2. 1 *Saund.* 339. 343.

1779.

COCKSLEDGE
against
FANSHAW.

[132]

to burgess of Derby prescribed in a right of common, through the medium of the corporation; and from *Brace*, title *Prescription* (a). The custom might also have arisen, by a subsequent agreement between the city and the free factors. It was not necessary for the plaintiff to shew the exact origin; it being sufficient for him, if there was any possible legal commencement of such a privilege.

LORD MANSFIELD.—The foundation, upon which the plaintiff rests his title, is this; that, by immemorial usage, to which there has been no interruption since the time of *Richard I.* freemen-factors have a right to take, to their own use, that part of the farthing duty which is paid for corn consigned to them. The defendant denies the fact, and says, there is no such usage or custom. I speak to the fact now; the legal objection I will consider by and by. But this is the fact upon which the parties are at issue; and this is to be tried by the jury. Nobody else can try it; because it is a conclusion of fact from the evidence. Almost all the objections that have been made, are such as were very proper to be stated to a jury, to induce them to doubt of the fact of such immemorial usage; to induce them to conclude that it began in fraud, or mistake; that it could not begin in the way in which it is claimed; that such an usage could not possibly be immemorial; and, on the second trial, all this was strongly put to the jury. But, what is now brought before the court on this demurrer? Not a question, whether the evidence was sufficient to satisfy the jury of the fact of the custom, for, by the demurrer, the defendant admits every fact which the jury *could* have found upon the evidence. The only question before the court is, Whether, supposing the fact to be as the plaintiff contends, and that, immemorially, without any exception since the time of *Richard I.* the usage has been for the freemen-factors to receive the farthings, such usage could, by any possibility, have a legal commencement? The plaintiff was not bound to find out what the actual commencement was, because it has existed from time immemorial. The city itself has no writing, or grant, to shew. They only say, the duty has been paid to them as a right, time out of mind, by all but freemen for their own corn. The plaintiff says, there is another qualification: "It has not been paid by freemen-factors for corn consigned to them; they have always enjoyed that privilege." If, by no possibility, such a privilege could have a legal commencement, then, to be sure, the fact of its existence does not decide the question; because, in point of law, that does not establish the right; but the rule of law is, that, wherever there is an immemorial usage,

the court must presume every thing *possible*, which could give it a legal origin. Whether *probable* or not, is for a jury to decide. Now, why is it not possible that, in the original grant, the crown may have said, for the purpose of encouraging persons to take up their freedom, that no freeman should pay the duty to the city, either for his own corn, or for corn consigned to him as a factor? Would such a grant be void? Certainly there may have been such a grant. But, further, in cases of this sort, an act of parliament may be presumed. Many, if not all the usages and customs of the city of *London*, are confirmed by act of parliament. Or, the privilege may be founded on a bye-law, made before time of memory. Suppose, after the grant to the city, there had been a bye-law made, by which, for the purpose of encouraging factors to become free, and by that means, introducing the corn trade, the corporation gave them, when freemen, all the farthings arising on corn consigned to them; surely there is nothing impossible in this; and there is a colour for supposing *that* to be the ground, from the evidence; because it is in proof, that the factors purchase the freedom on purpose to acquire the privilege. The only point now before the court was very fully considered, upon the second motion for a new trial, and we were all of opinion, that, if supported by immemorial usage, it was impossible for the court to say, that the privilege could not have a legal commencement.

WILLES, *Justice*,—I am of the same opinion, for the reasons which my Lord has given. As to one thing urged by Mr. *Davenport*, viz. that there could be no corn-factors in the time of *Richard I.* though, perhaps, they did not then exist by that name, yet, as *London* was a flourishing city long before that period, it must have been supplied with corn in great quantities; and it would be absurd to suppose that the growers themselves brought their own corn from all parts of the kingdom to the *London* market. When they did not come themselves, they must have employed factors, agents, or consignees, to sell it for them.

ASHHURST, *Justice*,—I am of the same opinion. The question now before us, is precisely what was decided on the last motion for a new trial. The opinion of the court then was, that the custom might have a legal commencement. As to the evidence, there is certainly enough to have warranted the jury in inferring, that the usage had existed as far back as the time of memory. There was sufficient to be left to a jury, and that is all that is requisite.

BULLER, *Justice*,—Though Mr. *Davenport* divided his argument into five parts, it seems to me, that there are but

1779.

COCKSLEDGE
against
FANSHAW.

[133]

1779.

COCKSEGE
against

FANSHAW.

[134]

but two questions in the cause. The first, What is the nature of a demurrer to evidence? the second, Whether the custom set forth in this demurrer-book, as stated by the plaintiff's counsel, be, or be not, good in law? With respect to the first, I think Mr. *Davenport* has gone a great way too far. It is the province of a jury, alone, to judge of the truth of facts, and the credibility of witnesses; and the party cannot, by a demurrer to evidence, or any other means, take that province from them, and draw such questions *ad aliud examen*. I think the plain and certain rule is this: The demurrer admits the truth of all facts, which, upon the evidence stated, *might* be found by the jury in favour of the party offering the evidence. Mr. *Davenport* puts the case of a special verdict, and says, the reason for a demurrer to evidence is, that the party demurring does not chuse to trust the jury. In a certain degree that is true; but the reason of not trusting the jury is, because they may, if they please, refuse to find a special verdict, and then the facts never appear on the record. But whether the case comes before the court on a demurrer to evidence, or on a special verdict, the law is the same. Now, if this cause had been put into the shape of a special verdict, what must have been stated on the record? The jury could not find all the evidence set forth in the demurrer, but must have pronounced upon the fact, whether or not such an immemorial custom had existed, and then it would have been for the court to decide, whether such a custom was good in law. I agree with Mr. *Wood* in his definition of a demurrer to evidence; and I am clear that there was sufficient to be left to a jury, and, therefore, on the first question, there seems to me to be no doubt at all. As to the second, though I have no doubt in my own mind, yet I have known so much of the cause before, that I purposely avoid giving any opinion upon it.

Judgment for the plaintiff [5].

[5] Upon this judgment, the defendant brought a writ of error in the Exchequer Chamber, where the cause has been twice argued, *viz.* *M. 21 Geo. 3.* by *Adair*, Serjeant, for the plaintiff in error, and *Wood* for the defend-

ant; and *T. 21 G. 3.* by *Davenport* for the plaintiff in error, and *Chambers* for the defendant. It now stands for judgment. (*Vacation after T. 21 Geo. 3.*) [† 50].

[† 50] In *E. 22 Geo. 3.* the Judges of the Common Pleas, and the Barons of the Exchequer, delivered their opinions, and reasons, *seriatim*; when they were all of opinion with the Court

of King's Bench, except *Eyre*, Baron; and, accordingly, the judgment was affirmed. Afterwards, a writ of error was brought in the House of Lords, where, after the case had been argued

at the bar, the following questions were put to the Judges; viz. 1. Whether the evidence and facts admitted, upon which this demurrer has been joined, are sufficient in law, to maintain the issue for the defendant in error? 2. Whether, if the evidence be insufficient, or uncertain, a new venire ought to have been awarded?

Gould, Justice, (in the absence of Skynner, Chief Baron, who was confined by indisposition,) delivered the

unanimous opinion of the Judges present, (*Eyre*, Baron, being one,) upon the first question, in the affirmative; and submitted to the House, that, the first question being so answered, any answer to the second was unnecessary. Upon this, the judgments of the Court of *B. R.* and *Cam. Scacc.* were (5 June, 1783,) unanimously affirmed.

1779.

COCKSEDGE
against
FANSHAW.

The KING *against* the MAYOR and BURGESSSES of LYME REGIS, on the prosecution of the *Honourable* HENRY FANE. [135]

Wednesday,
28th April.

A *Mandamus* having issued to restore the *Honourable* Henry Fane, to the office of a capital burgess of the borough of *Lyme Regis*, the corporation returned, That one Coade, one of the capital burgesses, had exhibited "*certtain articles of complaint*" against Fane: that, by "*the said articles of complaint*," he had charged him with having been duly summoned, and having neglected to attend the corporation meeting, for the election of a capital burgess; and that, by "*the said articles of complaint*," he had also charged him with non-residence, and neglect of his duty as a capital burgess: that it was ordered, that a copy of *the said articles* should be given to Fane, and that he should have notice to appear, at the next meeting of the mayor and burgesses, to answer the several articles against him, in the said complaint contained, and to shew cause, why he should not be removed and displaced from his office: that the copy and notice were served: that a meeting was had, where he appeared, and was charged with, and accused of, the non-residence, absences, contempts, neglects, breaches of duty, and misbehaviour, specified and contained in *the said several articles of complaint* so exhibited against him. That the meeting heard evidence in support of the "*said several articles*" mentioned and contained in the said complaint, and in Fane's defence, and, also, what was alleged by him and his counsel why he should not be removed from his office of capital burgess, "*for the several matters in the said articles of complaint mentioned*;" and, thereupon, it was adjudged, that he was "*guilty of the non-residence, absences, contempts, neglects, breaches of duty and misbehaviour, and other matters objected and charged against him, in and by the second and fourth articles of the said complaint*;" and that, thereupon, they had

A clerical mistake may be amended in the return to a *mandamus*, after the return has been filed.

1779.

The KING
against
LYME
Rex vs.

[136]

resolved to remove him from his office; and had removed him; and that he had not been elected since; so that they could not restore him.

This return had been filed last term. The defendants, afterwards, discovered that they had, in that part of it which stated the conviction, set forth, that the prosecutor had been found guilty of the charges in the third and fourth articles, without having stated, in the preceding part, that the complaint consisted of four articles; that, on the contrary, by the recital of the complaint in the return, it seemed rather to be stated as containing only two; and that it did not therefore certainly appear, that the articles on which *Fane* was convicted, were the same which were set forth as containing the accusations against him. A motion was, therefore, made this term, (on Monday the 26th of April,) and a rule granted, to shew cause why the defendants should not be at liberty to amend, by inserting the words, "second of the, and "fourth of the," in that part of the return which recited the articles on which he was accused, so as to make it run thus, "and, by the second of the said articles of complaint, charged and accused the said Honourable Henry Fane," &c. and again, "and by the fourth of the said articles of complaint," &c.

The Solicitor General, *Dunning* and *Rooke*, now shewed cause.—They said, enquiry had been made at the office, and that no instance could be found, where the court had permitted a return to be amended after it had been filed, and, thereby, made a record of the court. That the case of the amendment of a return in *Shower* (b) (which had been cited when the rule was obtained), was upon a motion which did not appear to have been opposed, and it did not appear that the return, in that case, had been filed. That, in the case of *Lepara v. Germain* (c), after a plea in abatement on the ground of an erroneous addition, viz. that the defendant had been stated as *Knight*, instead of *Knight and Baronet*, the court refused to permit an amendment, by inserting the words "and Baronet," although the proceedings were all in paper.

Beacroft, in support of the rule, relied upon an affidavit, which stated, that the omission of the words, now prayed to be inserted, had arisen from a mere mistake of the gentleman who settled the draught of the return, and who had struck his pen through those words.

Lord MANSFIELD, — It is very essential to the administration of justice, that slips, or mistakes of the pen, should not be fatal. I am satisfied this is a mere blunder, and not a trick; and the amendment suggests itself upon inspection.

(b) *Ren v. Mayor of Chichester*, T. (c) *E. 2 Ann. B. R. 1 Salk. 50.*
3 W. & M. 1 St. 273.

tion. As the return stands at present, it is nonsense. There is no case cited, where the court has refused to amend such a mistake, although the return has been filed. The case in *Shower* seems to be an authority to the contrary.

The rule made absolute; the defendants undertaking, if an action for a false return should be brought, to take short notice of trial, and not to bring a writ of error, if there should be judgment against them [4].

[4] There were four other returns, (*mutandis*;) and the mistake in the todifferent writs of *mandamus*, in which draught had been copied in all of them.—*Vide supra, Richards v. Brown.* p. 114. to 116.
The returns were the same, (*mutatis*

1779:

The KING
against
LYNE
Rex v.

LONGCHAMP against KENNY.

Thursday,
29th April.

THE plaintiff was a waiter at one of the great subscription-houses, or clubs, in *St. James's Street*, of which the defendant was the master. Each of them had received, from Mrs. Cornelys, a number of masquerade tickets, to dispose of, for which they were to account, after the masquerade, by paying the value, or returning the tickets. Kenny had got possession of one of the tickets which had been delivered to Longchamp, and, when Mrs. Cornelys's agent came to demand an account of Longchamp's tickets, he was told, by Longchamp, that Kenny had had one of them, and he must pay for it. Upon this, the agent went and made a demand on Kenny, who said, "Well, if I had it, what then? Go to the person who received it of you, and let him pay you." Longchamp was then threatened with an arrest, on which he paid five guineas, (the value of the ticket, to Mrs. Cornelys, and then brought this action against Kenny. The declaration contained a count for money had and received, one for money paid, laid out, and expended, and one for money lent. The cause was tried at *Westminster*, on Thursday the 18th of February 1779, before Lord MANSFIELD. The plaintiff, besides the above facts with regard to the ticket, endeavoured to prove a sum of money due for wages, but, there being no count for wages, nor for work and labour, it seemed clear that he could not recover on that ground; and, the jury having found a verdict for him, with five guineas damages, they mentioned that they found this sum expressly for the ticket. It appeared, that the defendant was apprised, that the plaintiff meant to sue him for the value * of the ticket, and that he came prepared to resist that demand. Lord MANSFIELD, at the trial, expressed great doubt, whether the

If one person obtains possession of goods entrusted to another to be sold at a fixed price, and, at the time when the goods are to be re-delivered, or the price accounted for, he refuses to do either, and the person to whom they were entrusted, being threatened with an action, pays the fixed price to the owner, such person may recover the sum against him who took possession of them, in an action for money had and received—Perhaps, in one for money paid.

* [138]

1779.

LONG-
CHAMP
against
KENNY.

action could be maintained, either on the count for *money paid*, (on which the plaintiff's counsel relied,) or on that for *money had and received*. He said, he would reserve the question, for the opinion of the court, on a motion for a non-suit.—(It was clear that none of the evidence applied to the count for money lent.)

Dunning, and *Cowper*, now shewed cause against setting aside the verdict.—*Bearcroft*, and *Mingay*, on the other side.

For the defendant, it was contended, that *trover* was the proper form of action. In a count for money paid, the words, "*at the defendant's special instance and request*," are not mere words of course. There must be a privity in the transaction, between the parties, in order to support such a count; and, as to the count for money had and received, though such privity is not necessary to support that, yet it must appear, that money, which ought to have been paid to the plaintiff, had, in fact, been received by the defendant. In this case, there was no proof that the ticket had been sold, or any money received for it, by *Kenny*.

LORD MANSFIELD,—It is certain, that, where the demand is for a specific thing, an action cannot be maintained in this form. Great benefit arises from a liberal extension of the action for money had and received; because the charge and defence in this kind of action, are both governed by the true equity and conscience of the case. But it must not be carried beyond its proper limits (*b*). The plaintiff must never be permitted to turn the generality of the count into a surprize upon the defendant, by deserting the ground which the defendant was led to think the only matter to be tried, and resorting to another, of which he could not have the least suspicion. If the present action had been brought without notice of the nature of the demand, I should have thought it could not have been supported. But, here, the defendant came prepared. If he sold the ticket, and received the value of it, it was for the plaintiff's use, because the ticket was his. Now, as the defendant had not produced the ticket, it is a fair presumption that he has sold it.

ASHHURST, and BULLER, *Justices*, were inclined to think, that the evidence would have supported the count for money paid. ASHHURST, *Justice*, compared this case to that of a surety, who, by paying the debt for the principal, saves him from being sued, and who can maintain an action against him for money paid. In like manner, he said, the plaintiff here had paid the five guineas under a compulsion brought upon him by the defendant, and had thereby saved *him* from an action. But they gave no deci-
live

[139]

(*b*) *Vide supra*, *Weston v. Downes*, M. 19 G. 3. p. 23, 24.

five opinion on that point ; being clear, that the count for money had and received was maintainable.

The rule discharged.

1779.

GOODTITLE, Lessee of FOWLER, and Another,
against WELFORD.

Thursday,
29th April.

THIS was an ejectment, in which the lessors of the plaintiff claimed under the will of one *Elizabeth Bexley*. The action was tried before Lord MANSFIELD, at *Westminster*, at the Sittings after last *Hilary Term*, and one *Hearle*, who was named executor in the will, and was also devisee of a reversionary interest, expectant on an estate for life, in some copyhold land part of the estate devised, was called, on the part of the plaintiff, to prove the sanity of the testatrix, which was impeached by the defendant. To obviate the objection of interest, he had surrendered his estate in the copyhold lands to the use of the heir at law, but *he* had refused to accept the surrender.

An executor who takes no beneficial interest, is a competent witness to prove the sanity of the testator.—If a person who is interested execute a surrender or release of his interest, he may be examined as a witness, although the surrenderee, &c. refuse to accept the surrender or release.

The counsel for the defendant insisted, that *Hearle* was an incompetent witness ; 1. Because the surrender was ineffectual, and did not extinguish his interest, not having been accepted ; 2. Because he had acted in the executorship, having paid different legacies, and, therefore, had rendered himself liable to be sued, if the will should be set aside.

Lord MANSFIELD over-ruled both objections, and, the witness being examined, the jury were satisfied of the sanity of the testatrix, and found a verdict for the plaintiff.

On a rule to shew cause why there should not be a new trial, which came on to be argued this day, *Bearcroft*, *Dunning*, and *Bolton*, were of counsel for the defendant.—The *Solicitor General*, and *Lane*, for the plaintiff.

For the defendant, besides the two objections to *Hearle's* evidence which had been made at the trial, it was now contended, that, as executor, he was entitled to the residue of the personal estate not disposed of by the will, and was, therefore, interested, on that account, to support it. One clause in the will was in the following words, " I devise and bequeath to *E. Lawrence* all the rest of my goods, plate, and cloaths ;" and it was contended, that, although the word " goods," had it been used alone, would perhaps have comprehended the whole personal estate, yet it appeared by the subsequent words, that it was only used to express a specific legacy, and therefore the rest of the personal estate would vest in the executor, who had no legacy given him, which could raise a resulting trust in favour of the next of kin.—To shew, that nothing

[140]

1779.

GOODTITLE
against
WELFORD.

thig passes by a release or surrender, unless accepted by the person in whose favour it is made, they cited *Perkins*, title *Surrender* (c), and *Shephard*, same title (d).

For the plaintiff, in answer to the objection that *Hearle* might be liable to be sued for what he had done in the character of executor, if the will were set aside, the case of *Lowe v. Jolliffe* (e) was relied upon, where one *Dovey*, an executor who had released a legacy given him by the will, and, therefore, took no beneficial interest, was admitted, on a trial at bar, to prove the testator's sanity, although he was objected to, on the general ground of his being liable to be sued for his acts as executor, if the will should be set aside, and, also, because he had actually sold a set of chambers which had belonged to the testator, and was, therefore, answerable to the purchaser for the title.

The counsel for the defendant said, that, in the case of *Lowe v. Jolliffe*, the purchaser of the chambers was in court at the trial, and, upon the objection being made, offered to release to *Dovey*, and that *Dovey* was only admitted as a witness in consequence of that offer [1].

Lord MANSFIELD,—This will has been tried three or four times; and there have been contradictory verdicts. On the trial, in the present instance, the jury were satisfied. But a motion has been made for a new trial, not on the merits, but on the incompetency of a witness. When the witness was produced, the counsel for the plaintiff read his surrender of the copyhold estate left to him by will, but it was objected, that this surrender had not been accepted.—The witness, on being questioned, said, he had acted as executor, and that the legatees had received their legacies under the will. On this ground also, it was contended, that he was interested, because, if the will should be set aside, he would be answerable for having acted *de son tort*. But he was not objected to, at the trial, as being entitled to the residue of the personal estate. Now, on such a motion as the present, no objection to a witness should be received which was not made at the trial. If this new objection had been made *then*, it might perhaps have been shewn, that there was no residue, or a release might have been given, &c.—As to the other objections. 1. The bequest to the witness would certainly have gone to his competency, if he had not parted with his interest; but, as he has parted with it, as far as depends upon him, third persons have a right to his testimony, and the surrenderer shall not deprive them of it, by refusing to accept the

(c) § 608.

(d) *Sheph. Touchst.* p. 307.

(e) *B. R. E.* 2 G. 3. Since reported, *Blackst.* 365.

[1] *Qu.* For, according to the report of the case in 1 *Blackst.* the court thought there was no occasion for the release; *loc. cit.* p. 366.

the surrender [1]. 2. It is contended, that, in an action concerning land, an executor is not a competent witness, because he may be sued for his administration of the personality. But he certainly has no immediate interest in the action; and I remember its being determined by Lord Hardwicke, on a petition for a commission of review, and afterwards by the Delegates, that it is an objection to an executor's testimony, that he may be liable to actions as executor *de son tort* [2].

WILLES, *Justice*.—It is clear that an executor in trust may be a witness [1]. If the testator had stopped at the word "goods," the legatee would have taken all the residue; but the addition of the words "*plate and cloaths*" may restrain the meaning. But the objection on this ground was not made at the trial, which is a reason for not setting the verdict aside. Besides, on a new trial, the witness may establish his competency, by releasing any interest he may have in the residue. As to the surrender, I think it operates without the assent of the surrenderee, and if, on three proclamations, the surrenderee would not come in to be admitted, I think the lord might take advantage of it, as a forfeiture.

ASHMURST, *Justice*.—Every objection of interest proceeds on the presumption that it may bias the mind of the witness; but this presumption is taken away, by proof of his having done all in his power to get rid of the interest.

The rule discharged.

[1] *Bent v. Baker*, B. R. H. 29 Geo. 3. 3 Term Rep. 27. 35.

[2] *Vide Bailie v. Wilson*, 15 Jan. 1744, cited 4 Burr. 2254, 2255.

[1] In *Goss v. Tracey*, Canc. M. 1715, Lord Cowper determined, "that a grantee, when he appears to be a bare trustee, is a good evidence, to prove the execution of the deed to

"himself." 1 P. Will. 287. 290.

And, in *Fountain v. Coke*, B. R. E. 26 Car. 2. 1 Mod. 107. it is said by Lord Hale, "an executor may be a witness in a cause concerning the estate, if he have not the surplusage given him by the will; and so I have known it adjudged."

1779.

GOODTITLE
against
WELFORD.

[142]

Friday, 30th
April.

MARTYN *against* HIND.

THIS was a case reserved for the opinion of the court.

The cause had been tried at the Sittings in London (a), after last Hilary Term.—The declaration stated, that the defendant, on the 13th of February 1769, by an instrument in writing, undertook and promised to retain and continue

If a rector give a person a title to the bishop by which he appoints him curate of his church, and undertakes to

continue him and pay him a salary, till he shall be otherwise provided of some ecclesiastical preferment, or for fault by him committed, lawfully removed, he cannot remove him, without cause, while he continues rector of that parish, and during that time the curate may recover the salary in an action upon the title.—But if the rector is bound *sole* preferred to another living, the obligation ceases.—A readership is not ecclesiastical preferment within the meaning of such a title.

(a) By consent; for the venue was laid in Middlesex.

1779.

MARTYN
against
HIND.

the plaintiff to officiate as curate in the parish church of *St. Ann, Westminster*, until otherwise provided of some ecclesiastical benefice, unless, by fault by him committed, he should be lawfully removed; and to pay him 50 guineas a year during that time; that the plaintiff had not been provided of any other ecclesiastical preferment, nor lawfully removed, and that the defendant had not, from the said 13th of *February 1769*, retained and continued him curate of the said church, and permitted him to officiate therein, and had not paid the 50 guineas a year, &c.—*Plea*.—*Non assumpsit*.—The case stated the instrument on which the action was brought, and which is called a *Title*, which was in these words:

“To the Right Reverend Father in God *Richard Lord Bishop of London*. These are to certify your Lordship, that I *Richard Hind*, rector of *St. Ann, Westminster*, in the county of *Middlesex*, and your Lordship’s diocese of *London*, do hereby nominate and appoint the Reverend *Thomas Martyn*, to perform the office of a curate, in my church of *St. Ann* aforesaid, and do promise to allow him the yearly sum of 50 guineas, for his maintenance in the same, and to continue him to officiate in my said church, until he shall be otherwise provided with some ecclesiastical preferment, unless, by fault by him committed, he shall be lawfully removed from the same; and I hereby solemnly declare, that I do not fraudulently give this certificate, to entitle the said *Thomas Martyn* to receive holy orders, but with a real intention to employ him in my said church, according to what is before expressed. Witness my hand, this 13th day of *February 1769*, *R. Hind*.”

The case then stated, that on the 6th of *July 1778*, the church of *St. Ann* had become vacant, on the defendant’s having taken other preferment, (*viz.* the living of *Rochdale*;) and that he had paid the plaintiff his salary, as curate, up to that time.

[143]

About the year 1776, upon a disagreement between *Hind* and *Martyn*; *Hind*, after giving him six months’ notice to quit the curacy, had refused to permit *Martyn* to officiate, and had discontinued the payment of his salary, upon which *Martyn* brought an action, in this court, similar to the present, on the written instrument above set forth, and obtained a verdict for the arrears then due; but the question, whether he could maintain the action, being brought before the court in Easter Term, 16 *Geo. 3.* on a motion for a new trial, it was looked upon as a matter of importance, and entirely new; and, after it had been fully argued at the bar, the court took time to consider.

The objections made to the action, on that occasion, were three. 1. It was contended, that the instrument did not

not contain any contract between the rector and curate, nor any promise from the latter to the former. That it was merely an engagement and indemnity, by the rector to the bishop, founded on the statute of 12 *Ann. st. 2. c. 12.* and on the canons, by which the bishop, if he ordain a person who has no curacy or preferment, is himself liable to maintain him. That, if any person was entitled to sue the defendant, it was the bishop. That *Martyn* was not a party to the instrument, and that the undertaking contained in it, was, as to him, without consideration; that there was no reciprocity of obligation between *Hind* and him, for that he might cease to act as curate whenever he pleased.

2. It was said, that *Martyn* had never obtained a regular licence, (which ought to be under seal,) to officiate as a curate, which it was incumbent on him to have done, in order to entitle himself to the benefit of *Hind's* undertaking, supposing it could be considered as an engagement to him. That a licence was in the nature of an investiture to a curate; and that, not being licensed, he was certainly removeable at the pleasure of the rector, and could not maintain this action as curate. Cases were also cited with a view to shew, that all curates are removeable at the pleasure of the rector, viz. *Price v. Pratt (a)*, *Bott v. Brabalon (b)*, *The Attorney General v. Brereton (c)*, *Birch v. Wood (d)*.

3. *Martyn*, since his nomination to the curacy, had been chosen to the readership of the same parish, with a salary of 30*l.*, and it was contended, that this was *ecclesiastical preferment*, within the meaning of the instrument, or title. That although many readerships were such as could be exercised by laymen, (according to the account of their duty in *Burn (f)*, and other writers on the ecclesiastical law,) this particular readership had functions belonging to it which could only be performed by a clergyman; such as assisting in the administration of the sacrament.

In answer, 1. to the *first* objection, it was argued, that the title was, in substance and effect an engagement with the plaintiff. That the words were, "I do promise to allow him," not, "I do promise to indemnify you, &c." That, if the instrument had been a deed under seal, none but persons strictly parties to the deed could have maintained an action upon it; but the case was different with regard to a common undertaking in writing, like the present. That it had been determined, in the case of *Dutton v. Poole*, that, on a promise made to one person, for the benefit of another, an action may be maintained by the person

1779.

MARTYN
against
HIND.

[144]

(a) *Bunbury* 237.(b) *Noy* 15.(c) 2 *Ven.* 425. 429.(d) 2 *Salk.* 506.(f) *Burn. Eccl. Law, title Reader.*

1779.

MARTYN
against
HIND.

person for whose benefit the promise was made (g). That the sum of fifty guineas was more than was required by any canon, or act of parliament, and, therefore, if an allowance to the extent required by law should be considered as an indemnity to the bishop, yet a salary exceeding that allowance could only arise from a contract between the rector and curate. That the consideration for the salary was the performance of the duty. 2. To the *second* objection, it was answered, that no part of the canon law makes a licence necessary. That the act of uniformity requires it for lecturers and preachers, but for no other persons (h); and, as to the cases mentioned, to shew that all curates are removeable at pleasure, none of them had established that doctrine. That *Birch v. Wood* had not gone further than a rule to shew cause. That the case in *Bunbury* had only decided, that a curate has not such an interest as to be enabled to sue for tithes; and that, in the case in *Verzey*, Lord *Hardwicke* had used the expression of "*common curates*," and applied what he said to them, in contradistinction to those who have a permanent interest in their office. That the general meaning and object of a licence is to attest the good morals of a clergyman, when he goes into a new parish, but that such attestation was unnecessary here, as the bishop of the diocese had attested the same thing, in as strong a manner, by ordaining the plaintiff. 3. As to the readership being an ecclesiastical preferment, the account given of the office in the writers on the ecclesiastical law was relied on; and, as, it appeared, that, although in some former appointments in this parish, part of the duty which the reader undertook was to assist in administering the sacrament, nothing of that sort was stipulated for in *Martyn's* appointment; it was insisted, that his office as reader was such as a layman might hold and execute as well as a clergyman.

[145]

Afterwards, in the same term, Lord MANSFIELD delivered the opinion of the court, to the following effect:

Lord MANSFIELD,—At the trial, the defendant attempted to shew, that the plaintiff was lawfully removed *for fault by him committed*, and offered evidence to prove the irregularity of the plaintiff's life and behaviour; but I would not suffer this evidence to be given, being of opinion, either that the rector ought to have represented his conduct to the bishop, and applied to him to remove him, or, if he himself could remove him on that account, that he ought to have notified to him that the cause of his removal was his immoral behaviour, which he had not done. I am still of the same opinion,

(g) *B. R. M. 29 & M. 30 Car. 2.* (h) *13 & 14 Car. 2. c. 4. § 19.*
1 *Ventr. 318. 332.*

nion, as to that part of the case, as at the trial, and no objection has been made to it, on the argument. But I desire it to be understood, that this does not imply an opinion, that the bishop may not remove a curate, nor even that the rector may not, for just cause, properly notified to the curate. Those points still remain open. As to the *first* of the three objections made on the part of the defendant, it will be necessary to consider the nature of *titles* to the bishop. The 33d canon of 1603, is in the following words: "It hath been long since provided, by many decrees of the ancient fathers, that none shall be admitted, either deacon, or priest, who had not first some certain place where he might use his function: according to which examples, we do ordain, that, henceforth, no person shall be admitted into holy orders, except he shall, at that time, exhibit, to the bishop of whom he desireth imposition of hands, a presentation of himself, to some ecclesiastical preferment, then void in the diocese; or shall bring, to the said bishop, a true and undoubted certificate, that, either he is provided of some church within the said diocese, where he may attend the cure of souls, or of some minister's place vacant, either in the cathedral church of that diocese, or in some other collegiate church therein also situate, where he may execute his ministry; or that he is a fellow, or in right as a fellow; or to be a conduct, or chaplain, in some college, in *Cambridge*, or *Oxford*; or except he be a master of arts of five years standing, that liveth of his own charge, in either of the universities; or except, by the bishop himself that doth ordain him minister, he be shortly after to be admitted, either to some benefice, or curateship, then void. And, if any bishop shall admit any person into the ministry, that hath *none* of these titles, as is aforesaid, then he shall keep and maintain him with all things necessary, till he do prefer him to some ecclesiastical living: and, if the said bishop shall refuse so to do, he shall be suspended by the archbishop, being assisted with another bishop, from giving of orders, by the space of a year (i)." It appears from this canon, and from *Gibson's* commentary upon it, that a pecuniary provision is not the only object of a title, (for a title by *patrimony* or *pension* is thereby *constructively* taken away (k),) but that one purpose of it is, to assure the bishop that the person to be ordained has some church where he may exercise his function. And if, after being certified of that fact, the bishop ordains him, and he is afterwards removed, the bishop is not liable to maintain him. And, therefore,

1779.

MARTYN
against
HIND.

[146]

(i) *Burn's Eccl. Law, title Ordination, Gibf. vol. I. Tit. 6. c. 3.*(k) *Loc. cit. Note (f).*

1779.

MARTYN
against
HIND.

[147]

therefore, the bishop, in this case, can have no claim of indemnity against the defendant. The title is only a certificate to the bishop, of the fact, that the rector has undertaken to employ him, to pay him, and to continue him in the curacy, till provided in some other ecclesiastical preferment. It is difficult to conceive how any question could be made on this point, or how a doubt could have been entertained in the case of *Dutton v. Poole*, which, however, was not near so strong as the present. As to the *second* objection, the bishop having ordained the plaintiff on this very title, there surely cannot be a stronger licence. Whether it is such as would satisfy some penal statutes, may be a critical question; but we are of opinion, that it does not lie in the defendant's mouth to say, that *Martyn* has no licence, when he himself has admitted him to act as his curate, and has never before objected to him on this account, or given him notice, and an opportunity of obtaining one in form. With regard to the *third* point, after the fullest consideration, we find it impossible to say, that this readership is an ecclesiastical preferment. A reader, in the canon law, is always put in opposition to a clergyman. It means a person who reads prayers in the morning, and afternoon, on week days. It is an order in the *Romish* Church, inferior to a deacon. So it is called by *Burn* (1), and I am informed, that, in the *Wells* and *Chester* dioceses, there are laymen who officiate as readers at this day. The institution of the office in this parish has been looked into, and it seems that it existed before 1706. There are some entries in the parish books which require particular duties to be performed by the reader, as assisting in administering the sacrament, assisting the clerk, &c. When a certain appropriated fund ceased, from which the salary was payable, the vestry ordered 30*l.* a year to be paid out of what they call *commission money*, and afterwards to be charged by the churchwardens in their accounts. Now, what stability is there in this? The rector may refuse the reader the use of the church to read in. The parish may no longer choose to have prayers read on week days, and may discontinue the salary. We are, therefore, of opinion, that this is not an *ecclesiastical preferment*, within the meaning of the undertaking given to the bishop.

The rule for a new trial was accordingly discharged, and judgment entered up for the plaintiff [† 52].

The question now, upon the case reserved in the present action, was, Whether the plaintiff could recover the arrears of his salary of 50 guineas, from the time of the defendant's quitting the rectory of *St. Ann*?

Cowper

(1) *Ecc. Law, title Ordination.*

[† 52] That part of this case has been reported since, *Cowp.* 437.

Cowper argued for the plaintiff.—*Davenport* for the defendant.

For the plaintiff, it was contended, that the undertaking by *Hind* did not determine by his ceasing to be rector of *St. Ann*. It was a permanent agreement to provide for the plaintiff till he should obtain some other church preferment. It could not be avoided by the voluntary act of the defendant, but, if he had put it out of his own power to continue *Martyn* in the exercise of the functions of curate of *St. Ann*, he was still bound to pay him the salary. The nature of a title to the bishop is not a precarious provision, dependent on the will of the person who gives it, but certain, and only determinable by the misconduct, or preferment, of the person to whom it is given. To prove this, several cases were referred to in the register of archbishop *Winchelsea*, which are mentioned in *Gibson's Codex*, in the commentary on the 33d canon of 1063 (*m*), and particularly,—the following entry in that register; “An order from the archbishop to the bishop of *St. Asaph* to compel “*John* rector of *Goldfield* to pay the annual sum of five “merks sterling to *Amianus de Goldfield*, to whom the said “*John* had given a title for that sum, until he should be “provided for. Given at *Stepney*, *Kal. Apr. 1303*.”— And two orders from the archbishop; one, to a bishop, to provide for a clergyman whom he had ordained without a title; and another, of the like purport, to a bishop's executors, to oblige them to provide for one who had been ordained without a title.

For the defendant, it was insisted, that every sentence in the instrument confined the undertaking to the time of *Hind's* continuance in the rectory of *St. Ann*. It could not bind his successor, and certainly did not bind him to continue all his lifetime rector of that parish. The consideration for which the 50 guineas were to be paid was the performance of the duty of curate. The contract would want mutuality if it extended beyond *Hind's* continuance in the rectory of *St. Ann*, for he could not compel the plaintiff to officiate as his curate at *Rochdale*, his present living. An engagement to pay 50 guineas, independent of any clerical functions, would not have been a title upon which the bishop could have ordained the plaintiff.

Cowper, in reply, observed, that the plaintiff was prevented from performing his part of the contract, by the act of the defendant.

Lord MANSFIELD,—There does not seem to me to be any colour whatever for the present demand. The question is, what *Hind* has undertaken to do. He could not turn the plaintiff out at pleasure, but there is no pretence to

1779.

MARTYN
against
HIND.

[148]

1779.

MARTYN
against
HIND.

to say that he has undertaken for himself, or his executors, to maintain him for life, or to continue all his own lifetime rector of *St. Ann*. The question here is not, whether this is a good title or not; although it should seem that it is good. They commonly run in this form, and the curate takes the risque of the rector's quitting the living. A man may give a more permanent title, but the words of this instrument clearly confine the undertaking to the time of *Hind's* continuing rector of *St. Ann*. "I nominate, &c." "to the office of a curate of my parish of *St. Ann*," &c.

The *Postea* to be delivered to the defendant.

[149]

The KING *against* the MAYOR and BURGESSES of LYME REGIS, on the prosecution of FRANCIS FANE;—and the SAME *against* the SAME, on the prosecution of JOHN LUTHER.

Saturday,
1st May.

THE writs, in these cases, were exactly the same as in that of *Mitchell* (n).

In a return to a *mandamus* to restore, if it is stated—that the party was removed by the corporate body at large,—it is unnecessary to aver that the power of removal is vested in them, because it is incidental to them, unless given by charter, bye-law, &c. to a select part.—An action will lie for a *suppressio veri* in a return, as well as for an *allegatio falsi*—When non-residence is a ground for removing a corporator, it is unnecessary to summon him previously to come and reside.

The return, in the case of *Francis Fane*, set forth; That *Lyme Regis* was a borough by prescription. That the Mayor and Burgesses, (the corporate name,) had been immemorially accustomed to have a guild-house, called the *Moot-hall*, or *Guild-hall*. That, from time whereof, &c. till the granting the letters patent therein after mentioned, and also ever since, there had been, and still was, a council of the mayor and burgesses, consisting of the mayor and certain other persons, who, immemorially, until the granting the letters patent, were called *counsellors*, and, from the time of the granting the letters patent, *capital burgesses*, and that immemorially, till the letters patent, the council consisted of eleven burgesses, inhabiting and residing within the borough or the liberties thereof, of whom the mayor was one. That, till the letters patent, every counsellor, on his admission into that office, took an oath for the due execution thereof; and, from the time of the granting the letters patent, hitherto, every capital burgess, upon his admission into that office, had taken an oath for the due execution thereof; which oath, so respectively taken, was stated *in hæc verba* in the return, the material part being as follows: "You shall swear, that you shall be obedient to the mayor and his successors, when, and as often, as the mayor shall have occasion

(n) *Supra*, H. 19 G. 3. p. 79.

“ occasion to send for you, either for the affairs of the
 “ town, or else for to be aiding and assisting of him in
 “ the court, upon the pleading or hearing of any matter
 “ or cause depending before him, or for or concerning
 “ any other cause for the which the said mayor shall, or
 “ may, in respect of the office of the mayoralty, have
 “ occasion to hear, or use your opinion or counsel. His
 “ counsel and his brethrens’ you shall observe and keep,
 “ of and concerning all matters that shall be communed
 “ of in the council-house, or elsewhere, for the affairs of
 “ the common-wealth of this town, and shall not disclose,
 “ discover, or report abroad, what shall be treated of in
 “ the said council-house, or any particular man’s opinion
 “ there delivered, touching any thing that shall there be
 “ treated, or communed of, touching any the affairs of
 “ the said town.” That, till the letters patent, every
 counsellor, and since, every capital burgeses, was accustomed
 to reside and inhabit, and of right ought to have resided
 and inhabited, within the borough, or the liberties thereof,
 to advise and assist the mayor, touching the state, good
 rule, and government of the borough, and the administra-
 tion of justice within the same. That Queen *Elizabeth*,
 by letters patent of the 26th of *June*, in the 33d year of
 her reign, did, (*inter alia* stated in the return,) grant [7],
 That there should be for ever in the borough, a mayor,
 and eleven other burgeses in number only, out of the
 burgeses of the borough or town aforesaid, to be chosen
 and constituted according to the form in the said letters
 patent thereunder specified, who should be called capital
 burgeses; (then nominating as usual in charters, the first
 mayor and eleven capital burgeses.) The capital burgeses
 to continue for life, unless, in the mean time, for their
 own bad government in that behalf they should be re-
 moved. That the said mayor, and eleven burgeses there-
 by appointed by name, or the greater part of them, the
 mayor for the time being one, whenever to them, or the
 greater part of them, it should seem fit, in their sound
 prudence and discretions, should choose, not exceeding
 the number of four other persons of the inhabitants of the
 borough or town, to be other capital burgeses, so that the
 other capital burgeses, so to be chosen, together with the
 mayor, and the other eleven capital burgeses, should not
 exceed the number of *sixteen*, to be continued in the office
 for their lives, unless, &c. That, as often as the capital
 burgeses, so nominated, or thereafter to be chosen, (*i. e.*
 the eleven and four,) or any of them, should die, or be
 removed for, &c. then it should be lawful to the other capi-
 tal burgeses, being the common council, or the greater part of
 them,

1779.

The KING
 against
 LYME
 REGIS.

[150]

[7] Vide the following page, Note [7].

1770.

The King
against
LYME
REGIS.

[151]

them, to choose one or more of the other burgesſes, in the place or places of ſuch capital burgesſes or burgesſes ſo happening to die, or to be removed; and that he or they ſo choſen ſhould be a capital burgesſ, or capital burgesſes, in like manner as the capital burgesſes, by the letters patent before conſtituted, were and ſhould be. That, whenever a vacancy or vacancies ſhould happen, by the death or removal of any of the ſaid capital burgesſes, another or others of the burgesſes ſhould be elected a capital burgesſ, or capital burgesſes, *by the reſt of the council*, or the greater part of them, in the place of ſuch capital burgesſes ſo happening to die or to be removed. That the capital burgesſes, ſo from time to time to be choſen, ſhould take their oaths before the mayor and the reſt of the capital burgesſes, or the greater part of them, well and faithfully to execute their office. That by the ſaid letters patent, the queen granted to the mayor, and capital burgesſes, and their ſucceſſors, that it ſhould be lawful for them to keep or appoint a guild or council houſe, within the borough or town, commonly called the *Moot-hall*, and that *the ſaid mayor and capital burgesſes, the common council of the borough or town aforeſaid*, or the greater part of them for the time being, as often as to them it ſhould ſeem neceſſary, ſhould and might convoke, and hold, in the ſaid houſe, a certain convocation of the ſame mayor and capital burgesſes, or the greater part of them, and in the ſame convocation, ſhould and might treat, &c. of the ſtatutes, acts, articles, and ordinances, touching the borough or town, and the good rule, ſtate and government thereof, according to the tenor of the ſaid letters patent, as by the ſaid letters patent, remaining on record, might more fully appear [7].) That the mayor and burgesſes accepted the letters patent, in the ſeveral matters in the return ſpecified, and from that time, had acted under, and conformed thereto *, and that, ever ſince, the council had conſiſted, and of right ought to conſiſt, of the mayor and the capital burgesſes of the borough for the time being *. That *Fane*, on the 20th of *Auguſt*, 1774, was elected a capital burgesſ, and afterwards, on the ſame day, took the oath above ſpecified. That he had not, at any time ſince his election, inhabited or reſided within the borough, or the liberties thereof, but, on the contrary, had, ever ſince, inhabited and reſided with his family, in places out of, and at a great diſtance from the ſaid borough, and the liberties thereof, and had, during all that time, voluntarily, without good occaſion, abſented

[7] There was the ſame recital with that included in this parentheſis in the return to the *mandamus* to reſtore *Arthur Raymond*, *infra*, 177.

* This ſentence, (printed between two afteriſks,) was not in the return in the caſe of *Arthur Raymond*.

sented himself from the borough, and from the duty of the office of a capital burges; and that by his non-residence, and his voluntary absence from the borough, and the duty of his office, he did, during all the time of his being a capital burges, wilfully neglect* and omit the duty and execution of his office, and deprive the mayor and burgeses of that counsel, and assistance, and advice, which by the duty of his office, and according to the said oath, he ought to have given. That, at a meeting or convocation of the mayor and burgeses, held, according to the immemorial custom and usage of the borough, at the *Moot-hall*, or *Guild-hall*, on the 31st of *August*, 1778, *John Coads*, one of the capital burgeses, exhibited certain articles of complaint, &c. against *Fane*, (In the same form, and with the same omission, but which was now taken as amended, as in the return to the *mandamus* of the *Hon. Henry Fane* (a), except that here the only charge was *non-residence and consequent neglect of duty*, and the conviction was stated to be only on the *fourth* article of the complaint.) That a copy of the articles, and a summons to appear at the next meeting or convocation of the mayor and burgeses, then appointed to be held at the *Guild-hall*, on the 14th of *September* next, and answer the said articles, and shew cause why he should not be removed and displaced, were ordered to be, and afterwards, on the 31st of *August*, 1778, were served on *Fane*. That, in pursuance of an order made at the said meeting or convocation, held on the 31st of *August*, 1778, all the burgeses of the borough, within the reach of summons, were, afterwards, and before the holding of the next meeting, duly summoned, to appear at the said next meeting or convocation, to treat, advise, consult, and determine, touching the removal and discharging of *Fane* from the office of a capital burges, for the causes and misdemeanors mentioned and contained in the said articles. That, on the 14th of *September*, a meeting of the mayor and burgeses was, according to the said last-mentioned summons and notice, held, at the *Guild-hall* aforesaid, for the purpose aforesaid, amongst other business, and that *Fane* appeared. That, by his consent, the meeting was adjourned to the next day. That, on the next day, a meeting or convocation of the mayor and burgeses aforesaid was, according to and in pursuance of the said adjournment, held at the *Guild-hall*. That *Fane* also appeared at the adjourned meeting, and it was there adjudged, that he was guilty of the non-residence, absences, contempts, neglects, breaches of duty, misbehaviour, and other misdemeanors, and things, objected and charged against him, in and by the *fourth* of the said articles of complaint.

1779.

The King
against
LYME
Revs.

*[152]

(a) *Supra*, p. 135.

1779.
 The KING
 against
 LYME
 REGIS.

complaint. That he had not shewn any just cause why he should not be removed from his office. That the mayor and the rest of the burgessees holding the meeting, had resolved, that, for the *non-residence*, absences, &c. whereof he had been adjudged guilty, he ought to be removed, and did then and there remove him. That he had not afterwards been elected, admitted, sworn in, or restored; and that, for these reasons, they could not restore him, or cause him to be restored.

In the case of *Luther*, the return was, in every material part, exactly like that in the case of *Fane*. The validity of the return in the case of *Luther*, was argued before that in the case of *Fane*, (Lord MANSFIELD being, I believe, absent,) by *Rooke* and *Lawrence* (o); but I was not in court. Afterwards the case of *Fane* was argued by the same gentlemen, on this day.

ROOKE, against the sufficiency of the return,—I shall make three objections to this return. 1. Because it does not state that the meeting which disfranchised *Fane*, was held by any right or custom. 2. It does not aver that the corporation at large had an authority to disfranchise. 3. It does not state that they had a right to disfranchise for the reasons for which they have removed the prosecutor.—1. It is not stated that the meeting, when the disfranchisement was pronounced, was held by custom or charter; and one, or the other, is necessary to warrant a mayor in calling a corporate assembly. In the case of the *King v. Richardson* (p), a custom to hold the meeting was alledged in the plea to the *quo warranto*, although pleas do not require so great certainty as returns. Unless it can be stated as general law, that a mayor can call corporate assemblies at his pleasure, this meeting was not legal.—2. The right in the corporation at large to disfranchise their members, is not averred. The return may be all true, and yet the prosecutor may have been unjustly removed. This deprives him of any remedy, by traverse, or action. The same strictness is required, and the same principles govern in returns to writs of *mandamus*, as in indictments, or returns to writs of *habeas corpus*; *Re v. Hutchinson Mayor of Carlisle* (q), where it is said on the margin (r), that returns to *mandamuses* require even greater certainty than indictments, because they cannot be traversed, (that is, at common law.) Now, in the case of indictments, they are bad wherever all the facts stated may be true, and yet the party innocent; 2 *Hawk. Pl. Cr. c. 25. § 57. & § 119. 123. 126.* where it is laid down, that the caption of an indictment must shew, that the indictment was taken before

(b) On Saturday, 24th April.
 (i) E. 31 G. 2. 1 Burr. 517.

(q) M. 9 Geo. 1. 8 Mod. 99.
 (r) *Ibid.* 101.

for a competent jurisdiction, and that the jurors had authority to find it. In returns to writs of *habeas corpus*, an express and certain cause of commitment must be set forth, for the court will intend every thing against the person making the return; *Deyton's Case* (r), and 1 *Salk.* 350. 5 *Mod.* 83. But it will be said, that a power of amotion is incident to every corporation, and therefore it need not be stated. What is meant by incident? If it means, that it necessarily belongs to the corporation at large, I deny it. In Lord *Coke's* time, it was held, that a corporation had not the power of amotion, unless by custom or charter. However, that doctrine has been over-ruled since, in *Lord Bruce's Case* (s), and in the *King v. Richardson* (t), and I admit that corporations have a power to disfranchise. But custom, charters, or bye-laws, may restrain that power to a part. If they are silent, it is vested in the whole body. The question, therefore, comes to be, how far it is necessary to state legal presumptions. They only stand, till the contrary is proved. If it is competent to encounter such legal presumptions, a return ought to state something which will enable the opposite party to contradict what the general presumption would establish. But, on this record, it is impossible for us to deny the right in the body at large. It ought to have been expressly alleged. In indictments for not repairing highways or bridges, although the inhabitants at large are bound, at common law, to repair, yet it is always charged that they are liable, to let in a plea that they are not, but that particular persons are.—(BULLER, *Justice*,—"You cannot traverse that averment in the indictment.")—This case must be considered as independent of the statute of Queen *Anne* (u), for that act was intended solely for the benefit of persons suing out writs of *mandamus*, and not to take away the strictness which the common law required in returns; *Rex v. Mayor of Lynn* (v), and 2 *Burr.* 733. 741; and the certainty necessary at common law is established by *Bagg's Case* (w), in *Rex v. Clapham* (y), and in *Rex v. Mayor of Abingdon* (z). As to precedents, there is not one which does not aver a right to disfranchise, except that in *Bagg's Case*, and it has never been said that the return in that case could be supported. No inconvenience can arise from obliging the party to put this right on the record, whereas there will be great inconvenience the other way, as it will enable a mayor to throw the whole corporation into confusion, without any danger

1779.
The KING
against
LYME
REGIS.

(r) *Moore* 840.(s) *M.* 2 *Geo.* 2. 2 *Str.* 819.(t) 1 *Burr.* 539.(u) 9 *Ann.* c. 20.(v) *H.* 11 *G.* 2. *Andr.* 105.(w) *T.* 13 *Jac.* 1. 11 *Co.* 93. b.(y) *H.* 22 *Ed.* 23 *Car.* 2. 1 *Ventr.* 111.(z) *E.* 12 *W.* 3. 2 *Salk.* 432.

1779.

The KING
against
LYNE
REGIS.

danger to himself.—3. Supposing the power of amotion to be in the corporation at large, they have not shewn a right to disfranchise for the cause for which this prosecutor has been removed. They do not state that they ever gave him notice to come in and reside. They only say, that he was non-resident, at and since the time of his election, but no instance of any particular absence is specified. On this point, I must rely on the principles laid down by your Lordship, in the cases of *Rex v. Richardson* (a), and *Rex v. The Mayor of Liverpool* (b). It is charged, generally, that *Fane* wilfully absented himself, but no particular instance of disobedience to any summons to attend is set out, which ought to have been done, according to the doctrine in *Rex v. The Mayor of Doncaster* (c), and in *The City of Exeter v. Glyde* (d).

Lawrence, for the defendants,—1. If the corporation had a power to amove, and yet could not assemble for that purpose, that power would be nugatory. In the case of *The King v. Richardson*, the ground of amotion was non-attendance at corporate meetings, and, therefore, it was necessary to state the right to hold those meetings.—2. In all the former cases, they have founded the right on charter or custom. This is the first in which the power to remove as incident to the corporation at large has been relied upon, and, therefore, it is not to be judged of strictly by former precedents. But that such a power is, at common law, incidental to every corporation, is clearly established by *Lord Bruce's Case*, and by that of *The King v. Richardson*. Every common-law right will be taken notice of by the court. The business of pleading is to set forth the facts, not to draw inferences of law. Certainty to a common intent is all that is required in returns, and that not as has been argued, to enable the other party to bring an action for a false return, but for the information of the court, as was held in *Rex v. The Mayor of Abingdon* (e). This is resembled to cases of indictments and returns to writs of *habeas corpus*. But, as to indictments, the record must shew, before whom they were found, and by what jury tried, because those are facts; but it is never set forth, that the grand jury had power to find the indictment, or that the judge had authority to try it, because those conclusions in law are made by the court. So, in returns to writs of *habeas corpus*, if the power of commitment is at common law, it is never stated in the return. Thus, in the case of *Crosby Lord Mayor of London* (f), the power of the Speaker

[156]

(a) 1 Burr. 540.

(b) H. 32 Geo. 2. 2 Burr. 731.

(c) M. 3 Geo. 2. 2 Ld. Raym.

1564.

(d) T. 3 W. & M. 4 Mod. 33.

(e) 1 Ld. Raym. 559, 560.

(f) C. B. E. 41 Geo. 3. 3 Wils.

188. Since reported, 2 Black. 754.

Speaker of the House of Commons was not alleged. In an indictment against a gaoler, for an escape, there is no occasion to aver, that he was bound by the duty of his office not to suffer his prisoner to escape. So, in an indictment for not performing statute-labour on the highways, the authority of the overseers to appoint the work need not be alleged; *Rex v. Boyall* (f). The reason why, in an indictment for not repairing a road, it is stated, that the inhabitants ought to repair, is to give an opportunity of introducing the name or description of the defendants, for the purpose of shewing who are the offenders; but, if that were done in any other way, it would be sufficient. It is not necessary to follow the common form of words. Indictments for perjury are the only instances in which a legal authority is usually set forth. But that has only been the practice since the statute of 23 Geo. 2. (g). The precedents before that period, do not contain such an averment; *Co. Ent.* 363. 368. *Tremayne* 136. 144. 147. 157. It is said, that whatever was necessary to be stated before the statute of Queen Anne, is still necessary. This I admit. But then all the precedents of returns before that statute, were also prior to *Lord Bruce's Case*, when the general power of corporations at large was first settled, and till then, it was thought necessary to state the power, it not being considered as incidental. It is said, the facts here alleged may be all true, and yet the party unjustly removed, and that he will have no remedy. But, if the corporation have not the power of amotion, he still remains a capital burghes. If the right were not in the corporation at large, he might have suggested in his writ, that it was in a select part, and that he had been amoved by the whole body, and then the return must have denied the right to be in the select part. As the suggestion of false facts is a ground for an action, so is the suppression of true facts. Thus, suppose there were two charters, one giving, (with other privileges,) a power of amotion to a select part of a corporation, another of a later date, confirming the other as to every thing else, but restoring the right of amotion to the body at large. If a *mandamus*, in such a case, were to state a removal by the select part, and the return were to set forth the old charter only, all the facts in that return would be true, yet certainly an action on the case might be maintained for the deceit.—3. A stronger case of wilful absence cannot be stated, for the prosecutor is alleged never to have resided since his election. In *Richardson's case*, the offence was the non-attendance at particular

1779.
The King
against
LYME
REGIS.

[157]

(f) T. 32 & 33 Geo. 2. 2 Burr. (g) Cap. 11. § 1. *Infra*, 194.

1779.
The KING
against
LYME
REGIS.

particular courts, of which he might not have had notice; and, therefore, it was necessary to set forth that due notice had been given. But I conceive that, by law, a capital burghers is obliged to reside, and that, in such case, non-residence, without any summons to attend, is a forfeiture. In *Lord Shrewsbury's Case* (b), it is held, that, where an office concerns the administration of justice, the officer is liable to forfeiture for non-attendance, or non-user, and that he is bound to attend without any demand or request. In *Glyde's Case* (i), non-residence is stated to be a forfeiture of the office of alderman. In *Vaughan v. Lewis* (k), Lord Holt says, that a clause in a particular charter, making non-residence a forfeiture, was only declaratory of the common law, for that non-residence was, by law, good cause to remove a member of a corporation (l) [C 1]. In the case of *The King v. The Corporation of Wells* (m), a determined neglect, or wilful refusal, is held to be a ground of forfeiture; and non-residence is the most glaring neglect of any; and, in the case of *The Queen v. Truebody* (n), it was expressly decided, that, if a capital burghers quite leaves the borough, and goes and resides in another place, it is a sufficient ground for turning him out, and that there is no need of summoning him before he is removed, because he has abdicated the borough [C 2]. But, if this return were bad, the court would not grant a peremptory *mandamus*, when it appears that the prosecutor has deserted the corporation; *Rex v. The Mayor of Newcastle*, cited in *Rex v. Richardson* (o).

[158] Lord MANSFIELD,—The only question is, Whether, taking the law as clearly established, that the power of amotion is incident to a corporation, this would have been a sufficient return before the statute of *Queen Anne*; for I take it to be settled, that the same certainty is required now, as before that statute, though I think at first it might have been otherwise determined, because the reason was not the same. The great objection made to this return is, that the defendants have not set out, that the body at large has the power. They have set out the charter, and we must take it to be as stated, and there is no special power thereby given either to the whole body, or any select part.

(b) T. 8 Jac. 1. 9 Co. 50.

(i) 4 Mod. 36.

(k) E. 4 W. & M. Carth. 227.

(l) Ibid. 229.

[C 1] But non-residence, though a good cause of removal, does not, *ipso facto*, determine the office, but there must be a judgment of amotion pronounced by the corporation, before an information

in the nature of *quo warranto* will lie. *Vaughan v. Lewis*, and *Rex v. Heaton*. M. 29 Geo. 3. 2 Term Rep. 772.

(m) H. 7 Geo. 3. 4 Burr. 1999.

(n) E. 5 Ann. 2. Ld. Raym. 1275.

[C 2] *Rex v. Mayor of Shrewsbury*. T. 8 Geo. 2. Cases Temp. Lord Hardw. 147. 151.

(o) 1 Burr. 530. 534.

part. In such a case, the charter making them a corporation, the law implies the right to remove to be in the whole body. The charter leaves it to the rule of law. It is said, there may be some other charter or bye-law to the contrary. But is it necessary to state every possible negative,—as, that there is no other charter,—no bye-law, &c. ? I think it is not. If there were another charter or bye-law restraining the power, and that were not set out, can there be a doubt but an action would lie ? *That* would be misleading the court. Wherever there is a suppression of truth, and the party is thereby injured, he may maintain an action. As to the cause of removal, it is set out in express words, *viz.* a general non-residence. But, if the corporation has the power to remove, they must have power to hold a meeting for that purpose, and *that*, being incident to the other, need not be set out. It is not true that you are to presume every thing against a return. You are not to presume for or against it.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I will take the first and third objections together ; and, with regard to them, I think that a general non-residence being expressly stated as the ground of amotion, it was not necessary to give notice to come and reside ; for, if a member of a corporation ought, by his office, to reside, he is bound to know the law ; and, where there is a right to remove, there must be a right to assemble for that purpose. As to the great question, Whether it was necessary to state that the power of amotion was in the body at large ? it has been admitted, that it is, by law, incident to the whole body, if not restrained, by an express grant, to a select part. It is also admitted, that, if it had been stated, it would not have been necessary to prove it. But it is insisted, that this return may be true in every thing, and yet the party be entitled to be restored, and that he has no opportunity of traversing the right, or bringing an action for a false return. I agree that, in these returns, the same certainty is required as in indictments, or returns to writs of *habeas corpus*. Lord Coke has distinguished certainty in pleading into three sorts [C] [+ 53] ; 1. Certainty to a common intent, which is sufficient in a plea in bar ; 2. Certainty to a certain intent in general, as in counts, replications, &c. and so in indictments ; 3. To a certain intent in every particular, which is necessary in estoppels. The second of those sorts is all that is requisite here, and I take it to mean, what, upon a fair

1779.

The KING
against
LYNE
REGIS.



[159]

[C] Co. Litt. 303. a.

[+ 53] For an explanation of the different sorts of certainty, *vide* the judgment delivered by De Grey, Chief

Justice, in the case of *Rex v. Horns* in *Dom. Proc.* 11 May, 18 Geo. 3. *Comp.* 672. 682.

1779.
 The KING
 against
 LYME
 REGIS.

fair and reasonable construction, may be called certain, without recurring to *possible* facts, which do not appear. Before the cases of *Lord Bruce* and *Richardson*, it was thought necessary, to state the power to be in the corporation at large, because it was not then considered as incident to them. It is one of the first principles of pleading, that you have only occasion to state facts; which must be done, for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it. It is now settled to be matter of law, that, *prima facie*, the power of amotion is in the body at large. Being matter of law, it is not traversable. But the present prosecutor may now *reply*, that the power is not according to the general law in this case, but in a select body, which may then be tried by a jury. If the return be certain on the face of it, *that* is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. We must consider the charter as truly stated, because nothing appears to contradict it; and, if so, the law says, that, by such a charter, the corporation at large have the power of amotion. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. If the power of amotion is, in this place, in a select part, and the present return is bad on that account, I am clear that an action will lie. I say, if it is bad on that account, because it does not necessarily follow that it is bad. The contrary was held in *Braithwaite's Case* (p), which was recognized to be law by this court not many years ago, in a case from the borough of *Leicester*. *Braithwaite's Case* also proves, 1. That, although a return be true in words, yet, if it is false in substance, an action will lie, and, 2. That presumption and intendment, as far as they go, must be in favour of returns, not against them. If, in this borough, the power is given to a select part, by the charter or otherwise, the court is imposed upon, and the prosecutor injured; and it would be a very proper subject for an action.

[160]

The court pronounced judgment in favour of the return, both in the case of *Francis Fane*, and in that of *Luther*; but, upon the suggestion of the *Solicitor General*, that another objection, which was afterwards argued in the case of *Arthur Raymond*, applied also to these two, (as well as to several others,) they were all left open to the opinion of the court upon that objection (q).

(p) E. 21 Car. 2. 1 Vent. 19.

(q) *Infra*, p. 182. Note 19.

ALSOP and Another *against* PRICE.

1779.

Saturday, 1st
May.

THIS was a special case reserved for the opinion of the court.—The action, which was debt upon a bond, was tried before BULLER, *Justice*, at *Guildhall*, at the Sittings after *Hilary Term*, 19 *Geo.* 3.

The declaration stated, that the defendant, on the 17th of June 1772, by his writing obligatory, acknowledged himself to be bound unto *William Nash*, in his lifetime, by the description of the Lord Mayor of the city of *London*, *Sir Robert Ladbroke*, in his lifetime, and *Robert Alsop, Esq;* (one of the plaintiffs,) by the description of the two senior Aldermen of the said city, *Sir James Eyre, Knight*, the other plaintiff, by the description of the Recorder of the said city, *Sir Stephen Theodore Janssen, Bart.* in his lifetime, by the description of the Chamberlain of the said city, in 200 *l.* to be paid to the said obligees, when the defendant should be thereunto requested, and that, though often requested, he had not paid the same, or any part thereof, to the said obligees, or any of them, in the lifetime of *Nash, Ladbroke*, and *Janssen*, nor to the plaintiffs, or either of them, since the death of the said *Nash, Ladbroke*, and *Janssen*.—To this declaration the defendant pleaded, generally, that, after making the bond, and before the action brought, he became a bankrupt, within the meaning of the statutes made against bankrupts, or one of them, and that the cause of action accrued before the time when he so became a bankrupt; and concluded to the country.

The case stated, That a commission of bankruptcy issued against the defendant on the 5th of *September* 1776, and that he afterwards obtained his certificate, which was allowed by the Chancellor on the 1st of *May* 1777. It then set forth the bond on which the action was brought; and the condition. The bond appeared to be a joint and several bond by *James Sage Thomas Lawrence*, the defendant *Price*, and *Benjamin Ivory*. The condition cited, 1. That *Samuel Wilson*, late of *Hatton Garden*, in the county of *Middlesex*, *Esq;* deceased, by his last will and testament, bearing date the 27th of *October* 1776, directed that his executors should pay the sum of 20,000 *l.* if the residue of his estate should amount to that sum, or, if not, the amount of such residue, to the Chamberlain of *London*, for the time being, to whom, together with the Lord Mayor, the two senior Aldermen, and the Recorder, for the time being, he committed the management thereof, for the use and intent, that the said 20,000 *l.* or the amount of such residue, should be a perpetual fund, to be lent to young men who have set up one year, or not more than two, in some trade or manufacture, in the city of *London*,

On a general plea of bankruptcy under 5 *Geo.* 2. c. 30. the plaintiff may give the condition of the bond on which the action is brought in evidence, to shew that he is not barred by the certificate.—If a bond by a principal and surety has not been forfeited before the bankruptcy of the surety, the debt cannot be proved under his commission, and he may be sued upon it, after he has obtained his certificate.

[161]

or

1779.

ALSO
against
PRICE.

or within three miles thereof, and who could give satisfactory security for the repayment of the money so to be lent to them; and his will was, that no more than 300 *l.* nor less than 100 *l.* should be lent to any person or persons in copartnership, nor for any longer term than five years, and that every person, to whom any of the said money should be so lent, should, for the first year, pay 1 *per cent.* and, for the remainder of the time while he should keep the principal, 2 *per cent. per annum*; and that the borrower should pay the interest half-yearly to the said Chamberlain of London, under certain limitations and restrictions therein particularly mentioned. 2. That *Brass Crosby*, Esq; the late Lord Mayor, Sir *Robert Ladbroke*, Knight, and *Robert Alsop*, Esq; the late and then two senior Aldermen, *James Eyre*, Esq; the late and then Recorder, and Sir *Stephen Theodore Janssen*, Bart. the late and then Chamberlain, having accepted of the trusts so reposed in them, the executors had, some time before, paid to the said Sir *Stephen Theodore Janssen*, out of the assets of the testator, then come to their hands, 10,000 *l.* in part of the 20,000 *l.* which sum of 10,000 *l.* had since been applied and disposed of according to the uses and directions in the said will. 3. That the executors had paid, out of assets of the testator, since come to their hands, the further sum of 10,000 *l.* 4. That the said *James Sage Thomas Lawrence*, (the borrower, and first obligee in the bond,) who had been set up fifteen months in the trade of a watch-case maker, in the parish of *St. John Clerkenwell*, in the county of *Middlesex*, had applied to the trustees, for the loan of 100 *l.* part of the remainder of the said trust-money, for the time, and upon the terms, in the said will mentioned. 5. That the trustees, being satisfied, from the best information they could obtain, that the said *James Sage Thomas Lawrence* was, according to the directions and meaning of the will, a proper and deserving person to have the benefit of part of the said trust-money, had, that day, advanced and lent him 100 *l.* part thereof, for the term of five years, if he should so long live, on the terms and conditions in the said will recited, and therein after limited and appointed. The condition then declared, that the bond should be void, if, 1. the said *James Sage Thomas Lawrence*, his executors and administrators, should pay the interest, (in the manner above mentioned;) and if, 2. the said *James Sage Thomas Lawrence*, his executors and administrators, should, within twenty days after the expiration of five years, in case he should so long live and enjoy the benefit of the loan, repay, or cause to be repaid, to the Chamberlain of the city for the time being, on account of the trust, the said principal sum of 100 *l.*; and if, 3. (in case the said *James Sage Thomas Lawrence* should die before the expiration of the five years,) his executors or administrators

[162]

1779.

ALSO
against
PRICE.

administrators should, within three months after his death, repay the principal in like manner, together with all interest that should be then due; and if, 4. (in case the said *James Sage Thomas Lawrence*, or both or either of his sureties, within the five years, or before the principal should be repaid, should remove from their then present or future place of abode, or in case the said *Thomas Price* (the defendant) or *Benjamin Ivory*, or either of them, should, within the time aforesaid, die, or become bankrupt, or insolvent, or compound with their creditors,) the said *James Sage Thomas Lawrence* should, within a month after such, or any, or either of such removals, deaths, insolvencies, or compositions, give notice thereof, in writing, to the clerk of the trust for the time being, and also, if required so to do, within one month after notice should be given to him for that purpose, by the said clerk for the time being, nominate one or two other good and sufficient surety or sureties, to be approved of by the trustees for the time being, in the room of him or them so removing, dying, becoming bankrupt, or insolvent, or compounding his or their debts, and should also, with such new surety or sureties, enter into a new bond to the trustees for the time being, and so *toties quoties*.

This was all that was stated in the case; but it was admitted, at the trial, on the argument, that the bond had not been forfeited by the breach of any of the stipulations in the condition, till after the bankruptcy, *viz.* not till the 7th of July 1777.

[163]

Davenport, for the plaintiffs — *Morgan* for the defendant. — The case was argued on *Friday* the 30th of *April*.

Two questions were made. 1. Whether the plaintiffs could avail themselves of the condition, as they had not put it upon the record? 2. Whether, if they could, this was not such a debt before the forfeiture, as might have been proved under the commission? *Cowper*, who was of counsel for the defendant at the trial, had objected to the reading of the bond and condition by the plaintiffs, and to their being inserted in the case, because the bond, as stated in the declaration, was admitted by the plea, and not put in issue. *BULLER, Justice*, on the argument, said, that he had thought *Cowper* was right in his objection, but that he had permitted them to be stated in the case, from deference to the gentlemen, (the *Solicitor General*, *Dunning*, and *Davenport*,) who were of counsel for the plaintiffs.

Davenport, on the part of the plaintiffs, argued as follows: — 1. Wherever, by an act of parliament, a defendant is permitted to plead generally, and give the special matter of his defence in evidence, the privilege is reciprocal, and the plaintiff may also give all special matters in evidence, which tend to support his demand. Pleas of bankruptcy, (such

as

1779.

ALSO
AGAINST
PRICE.

[164]

as the present,) under the statute of 5 Geo. 2. (r), always conclude to the country. This is the settled form, which has been used ever since the passing of the act; and there is no example of such a plea being demurred to for not concluding with a verification. This being the proper conclusion of the plea, it was impossible for the plaintiffs to reply, and so put the condition on the record, and therefore the only method in which they could shew the nature of the debt, and that the bond was not absolute, was by producing it in evidence. In the case of *Thornton v. Dallas* (s) indeed he said that he had, to a plea of bankruptcy which concluded to the country, replied the special matter, in order to put the question in the cause upon the record; but that, if the replication had been demurred to, he must have withdrawn it, and given the special matter in evidence. Before the statute of 5 Geo. 2. the case was otherwise. The defendant then was obliged to set forth, in his plea, the trading, the act of bankruptcy, the petitioning creditors debt, &c. as was determined in the case of *Tully v. Sparkes* (t), and, to such a special plea, it was in the plaintiff's power to reply the special matter. Besides, in the cases of bankruptcy, before the statute, the defendant, in an action on a bond, could not, (as he cannot still in any other instance,) plead any matter whatever in discharge of the bond, without setting forth the condition. By this means, an opportunity was given to the plaintiff to avail himself of the condition, and it can never have been the intention of the statute to deprive him of that advantage, which would be the case now, if he could not give it in evidence. 2. As to the merits, this is not, as against the sureties, *debitum in presenti, solvendum in futuro*. It was not certain, at the time of the bankruptcy, that ever the defendant would be liable to the debt. It is not, therefore, a debt within the statute of 7 Geo. 1. cap. 31. which only applies to cases where the money is due at the time of the bankruptcy, although not payable till a future day. The statute directs a rebate of the interest for the interval between the actual payment of the dividend, and the time when the payment of the debt should have been made; but what rebate of interest could have been made to the plaintiffs in the present case [8]?

Morgan, for the defendant, insisted, 1. That the plaintiffs had undertaken to state their whole case in their declaration, and, if they had thought fit, they might there have set forth the condition of the bond, but as they had not done so, it ought to be considered as an absolute bond, for such

(r) c. 30. § 7.

(s) *Supra*, M. 19 Geo. 4. p. 46.

(t) B. R. M. 2 Geo. 2. 2 Ld.

Raym. 1546. 1548. 2 Str. 867.

[8] *Tully v. Sparkes* is also in point for the plaintiffs on this second head.

such it appeared to be from the declaration. The plea admitted the bond to be such as the plaintiffs, who ought to know their own title, had set forth, and only asserted, that the defendant had become a bankrupt subsequent to the time when the cause of action accrued. Nothing but that fact was in issue, and therefore the condition ought not to have been read; for it appeared, upon the plaintiffs' own shewing, that the debt was due immediately on the execution of the bond, long before the time when the defendant had proved that he had become a bankrupt.

2. That this was a debt which *certainly* would become due at a future day, and, therefore, within the spirit of the statute of 7 Geo. 1. That, in truth, the debt was contracted, and completed, at the time when the money was advanced. For this he cited *Macarty v. Barrow* (u) [15] He also cited *Ex parte Caswell*, before Lord King (v), *Ex parte Greenway* (w), *Ex parte Groome* (x), and *Ex parte Michell* (y), before Lord Hardwicke, and *Swaine v. De Mattos* (z), [98].

Davenport, in reply, insisted, That it was not incumbent on the plaintiffs to state the condition, in the declaration; they might not know that the defendant had been a bankrupt, nor, if they did, that he would avail himself of that defence. It would be a singular hardship if it were required of them to foresee, and answer by anticipation, every possible defence that might be set up [10].

BULLER, Justice, having asked, whether there was any instance, which had come before the court, where the plaintiff had been permitted to set forth the condition of a bond

1779.

ALSO
against
PAID.

[165]

(u) B. R. E. 6 Geo. 2. 2 Str. 949.
3 Wil. 16. *Supra*, p. 55. Note [† 28].

[†] *Vide Brookes v. Lloyd*. B. R. M.
26 Geo. 3. 1 Term Rep. 17.

(v) M. 1728. 2 P. W. 497.

(w) 1740. 1 Ask. 113.

(x) 1744. *ibid.* 115.

(y) 1751, 1752, *ibid.* 120, 121.

(z) T. 17 Geo. 2. at Guildhall before
Lee, Ch. Justice.

[9] The point ruled in the case of *Swaine v. De Mattos*, was only, that bonds payable at a future day are within the statute of 7 Geo. 1. though not given for goods sold by traders. The four cases in *Chancery* cited by *Morgan*, all go to establish the point insisted on by the plaintiffs in this present case, viz. that a debt which may perhaps never become due from the

bankrupt, cannot be proved under his commission, and, of course, is not discharged by his certificate.

[10] In *Tully v. Sparkes* the condition was set forth in the declaration, and, in the case *Ex parte Caswell*, Lord King is stated to have said, "The certificate will not bar, if the obligee is careful in declaring upon his bond; indeed if the party declared upon the bond only he shall be barred: *Secus* if he sets forth as well the condition, as the bond in the declaration, for then it must appear that the cause of action did not accrue at the time of the obligor's becoming a bankrupt." 2 P. W. 499. However this was only an *obiter* opinion.

1779.

ALSO
against
PRICE.

[166]

bond in his replication, *Davenport* said, it was done in the case of *Webster v. Bannister* (a), [11].

The *Solicitor General* mentioned a case of *Pattison v. Banks* [12], at the Assizes at *Carlisle*, before *ASHHURST, Justice*, in which, he said, the pleadings were similar to those in the present case; that, the certificate having been produced, and the bankruptcy appearing to have been long subsequent to the date of the bond, he offered the condition in evidence; that this was objected to; but that, after some argument, the judge admitted it; and that a case was afterwards stated for the opinion of this court, which was argued in *H. 17 Geo. 3.* but that this point was not reserved [† 54].

The court took time to consider; and, this day, Lord *MANSFIELD* delivered their opinion as follows:

Lord *MANSFIELD*,—We are all of opinion, that the plea given by the statute opens the whole merits of the question in evidence on both sides; and, on the merits, we think that this was not a debt which could have been proved under the commission; for the defendant was not originally the debtor. It was not a debt to be paid by him *in futuro*, at all events, but depended on the acts of the principal, *viz.* whether he did or did not comply with the stipulations in the condition of the bond [†].

The *poslea* to be delivered to the plaintiffs [† 55].

(a) *Infra*, *E. 20 Geo. 3.* 5th May, 1780, p. 393.

[11] That case came on in court in *M. 19 Geo. 3.* but I have postponed the report of it to *E. 20 Geo. 3.* because the last proceedings in court were in that term. The plea was a discharge under the insolvent debtor's act, and it concluded with a *verification*.

[12] The principal question made in that case was, whether bonds not granted for the price of goods, are within the statute of 7 *Geo. 1. c. 31.*; when the court decided that they are. *Swayne v. De Mattos* was cited, *ante*, n. 9. and, being said by *Chambre*, (for the plaintiff,) to be only a *Nisi Prius* case, *Wood*, (for the defendant,) answered, that it had been recognized to be law, by the court of *C. B.* in *Goddard v. Vanderbeyden*, *M. 12 G. 3. 3 Wilf. 262. 271.* *Wood* endeavoured to argue the same point, which was the first in the present case, in arguing *Pattison v. Banks*, but the court would not permit him, as it had not been reserved.

[† 54] *Pattison v. Banks* has been since reported, *Cowp. 540.*

[†] *Vide Paul v. Jones*, *B. R. H. 27 Geo. 3. 1 Term Rep. 599. S. P.*

[† 55] The following cases have been since determined.

HESKUYSON v. WOODBRIDGE and another. *B. R. M. 24 Geo. 3.*

The facts of this case came before the court in a special verdict, and were these: On the 13th of *June 1782*, the defendants applied to the plaintiff, to accept a bill for 300*l.* which they would draw upon him, and which he did, not having any effects of theirs in his hands. The bill being indorsed over by the defendants, and becoming due on the 16th of *August*, the plaintiff then paid it. At the time when it was drawn, the defendants gave the plaintiff a paper in the following words: "Received, the 13th of *June 1782*, of Mr. *R. D. Heskuyson*, his acceptance for 300*l.* due 16th of *August*, which

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"which we promise to pay when due, *John Woodbridge & Co.*" On the 22d of July, the defendants became bankrupts, and afterwards, obtained their certificate.

Bower, for the plaintiff, argued, that the note given by the defendants was a mere indemnity, and that the plaintiff's demand did not accrue till the bill was paid, and therefore not till after the bankruptcy. He relied on *Chilton v. Whiffin*, C. B. T. 8 Geo. 3. 3 *Wils.* 13.

Chambre, for the defendants, insisted, that the note was an absolute engagement, and constituted a debt within the meaning of the statute of 7 Geo. 1. c. 31. He agreed, that the meaning was to give an indemnity, but said, the question whether the case was within the statute depended on the thing done, not the intention; that, in *Chilton v. Whiffin*, the promise was in the alternative, and conditional, not positive, as in this case. He cited *Macarty v. Barrow*, and *Ex parte Mitchell*, Canc. 23 Dec. 1751. 1 *Atk.* 120.

Lord Mansfield,—"The note was clearly nothing but an indemnity to the plaintiff, against the consequences of his acceptance.

Fuller, Justice,—"This case is not distinguishable from *Chilton v. Whiffin*. The money was not payable at all events, in the present case, to the plaintiff. The defendants might have taken up the bill, and then the plaintiff would have had no demand against them.

Judgment for the plaintiff [O].

Cox v. LIOTARD, B. R. H. 24 Geo. 3.

This was an action on a policy of insurance, on the life of *J. H. Hyde*, lately gone to the *East Indies*, on the event of his dying between the 5th of April 1780, and the 5th of April 1783. The defendant pleaded; 1. bankruptcy generally, and that the cause of action accrued before the bankruptcy; 2. that the policy was made

prior to the time* of his becoming a bankrupt, then the trading act of bankruptcy, petitioning creditor's debt, commission, proceedings, and certificate, specially, and that he was thereby discharged from the said policy, and all debts due at the time of the bankruptcy, without saying that the cause of action accrued before the bankruptcy. To this last plea, there was a general demurrer.

Chambre, for the plaintiff, insisted, that this was a contingent debt, and not discharged by the bankruptcy and certificate, not being within the act of 19 Geo. 2. cap. 32. § 2. for that, though the enacting words are general, viz. "the assured in any policy of insurance," yet, as the preamble only mentions the cases of insurance "on ships or vessels, and the goods and merchandizes loaded thereon," the construction ought to confine the operation of the enacting part to such cases; that *Pattison v. Banks* might be cited for the defendant, where it was held, that the general enacting words were not restrained by those in the preamble, but that there was a difference between the subject matter of that, and that of the statute, of 19 Geo. 2.; for that, if the construction of the last-mentioned statute, instead of being confined to voyages, which terminate in a given limited time, and are clearly what was in the immediate contemplation of the legislature, should be extended to policies on lives, where the risk may remain unsettled for a very long and indefinite number of years, great inconveniences would follow. If the holders of such policies could claim under the commission, the assignees might either be obliged to impound effects for half a century; or, if they should, after a certain period, consider the debt as claimed and not proved, the policy creditor would be excluded

1779.

Also
against
Price.

*[167]

[O] Vide *Hockrell (or Hockley) v. Hockley*, C. B. M. 13 Geo. 3. 2 *Blackst.* 839. *Mason v. Vere*, C. B. T. 18 Geo. 3. 2 *Blackst.* 1217.

1779.

ALSO
AGAINST
PRICE.

excluded from his share of the bankrupt's estate, in case the death should afterwards happen within the time insured, and would yet be barred from any remedy against

the bankrupt.

Lord Mansfield, (stopping *Wood*, who was for the defendant.)—Though the preamble does not mention insurances of this sort, yet they are within the same mischief, and the enacting words are sufficient to comprehend them. The statute of 7 *Geo. 1.* is similar to this, and the case of *Pattison v. Banks* is in point.

Buller, Justice.—In *Mace v. Cadell*. B. R. M. 15 *Geo. 3.* Cowp. 232. it was determined, that the general enacting words of 21 *Jac. 1. c. 19. § 11.* are not restrained by the particular words of the preamble.

Judgment for the defendant.

JOHNSON v. SPILLER, B. R. H. 24.
Geo. 3.

This was an action for money had and received, money paid, money lent, and on an account stated. The defendant pleaded his bankruptcy and certificate, and that the cause of action accrued before the bankruptcy. The trial came on at *Guildhall*, before *Buller*, Justice, at the Sittings after *Michaelmas* term, 1783, when a verdict was found for the plaintiff, with 378*l.* 15*s.* 2*d.* damages, subject to the opinion of the court on a case reserved, which stated: That, on the 7th of *October* 1782, the plaintiff, being in want of 1800*l.* applied to the defendant to indorse his (the plaintiff's) promissory note for that sum, for the purpose of discounting it at the Bank; and as a security, or indemnity, the plaintiff deposited, in the defendant's hands, three Ordinance debentures, with the usual assignments thereon, executed by the plaintiff, so as to render them negotiable, for which the following memorandum was signed, viz. "Received, 4th of *September* 1782, of Mr. *James Johnson*, three Ordinance

debentures, viz. &c. (specifying them) amounting to 2077*l.* 4*s.* 10*d.* which I hold as a collateral security for his note of hand to me, dated 5th *August*, at three months, for 1800*l.* due the 8th of *November* next, *J. Spiller, J. Johnson*." The note for 1800*l.* was afterwards renewed, for the accommodation of *Johnson*, by another, dated the 7th of *October* 1782, payable in three months. On the 12th of *November* 1782, the defendant pledged one of the debentures for 779*l.* 5*s.* 2*d.* with Messrs. *Tibbitts*, as a security for 500*l.* for which he also gave his note of hand, payable two months after date. On the 10th of *January* 1783, the plaintiff paid his renewed note of hand for 1800*l.* to the Bank, to whom the defendant had indorsed it. On the 18th of *January* 1783, the defendant became a bankrupt, and, on the 29th of *March* following, obtained his certificate. On the 31st of *October* 1783, the plaintiff redeemed the debenture for 779*l.* 5*s.* 2*d.* from Messrs. *Tibbitts*, by paying 378*l.* 15*s.* 3*d.* the remainder of the 500*l.* having been received by them as a dividend under the defendant's commission.

Wilson for the plaintiff.—*Baldwin*, for the defendant.

Wilson contended, that this debt could not have been proved under the commission, and, therefore, was not discharged by the certificate. The first statute which made bankruptcy and a certificate an absolute discharge, from any debts, was 4 & 5 *Ann. c. 17.* The words were, "Shall be discharged from all debts by him, her, or them, due, or owing, at the time that he, she, or they, did become bankrupt;" and those words have been continued in 5 *Geo. 2. c. 30. § 7.* There are only two other acts, viz. 7 *Geo. 1. c. 31.* and 19 *Geo. 2. c. 32.* which respect the discharge from debts, by bankruptcy. The former extending the operation of the bankruptcy in that respect, to debts, which at the time of such bankruptcy are *debita in presenti*, but *solvenda in futuro*, the other to certain contingent debts therein specified.

The present case falls within neither of those acts. The debt was not at all due from the defendant to the plaintiff, till the plaintiff had paid the money to Messrs. *Tibbitts*. It was not, therefore, *debitum in presenti*, at the time of the bankruptcy, and it was clearly not a contingent debt within 19 Geo. 2. It was *Spiller* who borrowed the 500 l. of Messrs. *Tibbitts*. He gave his own promissory note for it, and also pledged one of the debentures, with *Johnson's* consent; for *Johnson's* consent was implied from his having made the debenture negotiable. *Johnson*, therefore, was only liable to Messrs. *Tibbitts* as a collateral surety for *Spiller*, and was not damnified till *October*, when he redeemed the debenture, and that was after the bankruptcy. This resembles many former cases of sureties, and, particularly, that of *Taylor v. Mills*, B. R. H. 17 Geo. 3. Cowp. 525. where it was determined, that a surety in a bond, who paid the debt after the bankruptcy of the principal, was not barred by the certificate of the principal, from recovering over against him, although the bond was forfeited before the bankruptcy. There is no substantial difference whether the surety gives a bond or not, or pledges part of his property. The only distinction between this case and *Taylor v. Mills* is, that, here, *Johnson* might have brought an action against *Spiller*, before his bankruptcy, viz. as soon as he pledged the debenture. But that action must have been trover, the right to which certainly still remains; for bankruptcy is no plea to an action for a tort (a); and the circumstance of the plaintiff's having got back the debenture, would only go in mitigation of damages. The only objection, therefore, here, must be to the form of the action; but, if the plaintiff has been obliged to pay the money in order to recover the debenture, why should he not recover that money upon an im-

plied *assumpsit*? He may waive his remedy for the tort, and affirm the transaction of the pledge, and then the case is the same as if he had gone at first with the defendant to Messrs. *Tibbitts*, and had then pledged the debenture as a collateral security.

Lord *Mansfield*, (stopping *Baldwin*,) — This is a very plain case. *Johnson* wanting money, prevails on *Spiller* to lend him his name, by indorsing his note to be discounted at the Bank, giving him, as a security, this debenture, (among others,) and making it negotiable. This put it in the defendant's power to dispose of it, and he pledged it with Messrs. *Tibbitts*. Afterwards, on the 10th of *January* 1783, *Johnson's* note was paid at the Bank. From that time *Spiller* became his debtor for money had and received, and was immediately liable in an action of *assumpsit*. This was before the bankruptcy; it was a debt which might have been proved under the commission; and, therefore, it is discharged by the certificate.

Buller, Justice, — It is not to be taken for granted, that a demand in trover cannot be proved under a commission of bankruptcy; where the demand can be liquidated, it may. It is only personal damage, as for an assault, &c. that cannot be proved. But, here, the plaintiff might have had a special action of *assumpsit*, as soon as the debenture was pledged. We are not to presume the consent of *Johnson*. It was only deposited with the defendant, to be kept as a security. As to the uncertainty of the demand in such an action, would it have been more uncertain than the demand in a common action of *assumpsit* on a *quantum meruit*, for goods sold?

The *Posse* to be delivered to the defendant [C].

(a) *Vide Goodtitle v. North*, B. R. H. 21 Geo. 3. *Infra*, 584.

[C] A principal and surety give a bond for payment of money by in-

stalments, and the principal gives the surety, by way of counter-security, in bond conditioned for the payment of the amount of the instalments, on a day

1779.

ALSO
against
PRICE.

day previous to that on which the first instalment is to be payable. Subsequent to the day, in the condition of the last-mentioned bond, but previous to that on which the first instalment is payable, the principal becomes a bankrupt, and afterwards obtains his certificate. After this, the surety pays the instalments, and then brings *assumpsit* against the principal. The court was of opinion, that the surety might have proved the sum in the condition of the bond to him, under the commission, and therefore they held, that the action was not maintainable. *Toussaint v. Martinnant*, B. R. M. 28 Geo. 3. 2 Term. Rep. 100. And, in a subsequent case, it was determined, that if a counter-bond is

given by the principal, to the surety conditioned for the payment of the sum for which he is bound, on the day previous to that on which the principal sum is made payable; this is a debt which the surety may prove under the commission of the principal, though he become a bankrupt, before the day of payment in the bond to the surety, and before he has been called upon to pay any thing for the principal. Consequently, the principal, after he has obtained his certificate, cannot be sued by the surety. *Martin v. Court*, B. R. T. 28 Geo. 3. 2 Term Rep. 640. Vide also, of another class of debts, *Ex parte Maydwell*, Canc. 1785. 1 Co. Bankr. 204. *Ex parte Beaufoy*, Canc. 1787. *Ib.* 205. *Ex parte Lord Clanricarde*, Canc. 1787. *Ib.* 209. and *Ex parte Brymer*, Canc. 1788. *Ib.* 211.

[169]
Monday, 3d
May.

POWELL *against* WHITE and Others.

In a joint action against several, the plaintiff cannot be non-prossed unless by all the defendants.

ON a rule to shew cause, why the judgment of *non-prossed* in this case should not be set aside, for irregularity, the circumstances were, that the plaintiff had sued out a bailable writ against three, that one was arrested, and put in bail, and, the plaintiff not having declared against him within two terms, he signed judgment, the other two defendants not having appeared to the writ.

Cause was this day shewn; but the court was clearly of opinion, that, in a joint action, the plaintiff could not be *non-prossed* by one, or some of the defendants, without the others.

Beacroft, for the plaintiff.—The *Solicitor General*, for the defendants [† 56].

The rule made absolute.

[† 56] But, where two defendants, in *assumpsit*, severed in pleading, and the one pleaded a bankruptcy, which, on issue joined, was found for him, it was held, that the plaintiff might enter a *nolle prosequi*, as to him, and still proceed to final judgment and execution, against the other; *Noke v. Ingham*, B. R. E. 18 Geo. 2. 1 Wils. 89. Vide also *Weller v. Goyton*, B. R. T. 30 & 31 Geo. 2. 1 Burr. 358. where it was held, that, when there is judgment by default against one defendant, in a joint

action, the other cannot *non-suit* the plaintiff, at the trial, on issue joined by him, nor, if the plaintiff neglect to proceed to trial, can he obtain judgment as in case of a *non-suit* under 14 Geo. 2. c. 17. § 1.

Philpot v. Muller, B. R. T. 23 Geo. 3. was an action of trespass against two, who severed in pleading, and one of them signed judgment of *non-prossed*, and sued out execution thereon. The execution was a *ca. sa.* in trespass on the case, instead of trespass. The judg-

judgment was of *E. 23 Geo. 3.* On a rule to shew cause, why the judgment and execution should not be set aside, for irregularity, *Buller*, Justice, said, there was a great difference between a *nolle prosequi*, (as in *Noke v. Ingham*), and judgment of *non-pros.* for that, by the latter, the plaintiff is put out of court as to all the defendants. He cited *Parker v. Lawrence*, *Cam. Scacc. H. 11 Jac. 1. Hob. 70. Slowley v. Eveley*, *Cam. Scacc. T. 12 Jac. 1. Hob. 180. Wallis v. Bishop*, *B. R. H. 7. Car. 1. Cro. Car. 239. 243. and Wal-*

ler v. Geyton [C]. However, he said, as the judgment was of a former term, it could not be set aside upon motion, but must be reversed by writ of error. But, as to the execution, the court ought to interfere, because it could not be got at by writ of error, and the party had no other remedy. The rule was made absolute, for setting aside the execution, the plaintiff undertaking not to bring an action.

1779.

POWELL
against
WHITE.[C] *B. R. T. 30 & 31 Geo. 2. 1 Burr. 538.*

Le CHEVALIER, Assignee of DORMER, a [170]
Bankrupt, against LYNCH and Another.

Monday, 3d
May.

A CREDITOR of *Dormer's*, to whom he was indebted before he became a bankrupt, attached, in the Island of *St. Christopher*, after the bankruptcy, a sum of money owing by *Lynch* to *Dormer*. Afterwards, *Lynch* coming to *England*, the plaintiff brought an action against him, to recover the debt owing by him to the bankrupt; and *Lynch* applied to the court for a rule to shew cause, why the trial should not be put off, till he should be able to procure from *St. Christopher's* evidence of the debt having been attached in his hands, in the manner just stated.

Money owing out of *England* to a bankrupt may be attached by the law of the place after, for a debt due before, the bankruptcy.

On shewing cause; this day, it was contended, that, as the debt for which the money was attached was due before the bankruptcy, the creditor was only entitled to his share of the dividend under the commission, and could not attach the money in the hands of *Lynch*, because the right to the money owing by *Lynch* was, by the assignment, vested in the plaintiff, for the benefit of all the creditors.

Lord MANSFIELD,—If a bankrupt has money owing to him, out of *England*, as in *St. Christopher's*, *Gibraltar*, &c. the assignment under the bankrupt laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them, and shall not turn them round by saying he is only accountable to the bankrupt. In *Scotland* they permit assignees of a bankrupt in *England* to sue for money owing to the bankrupt in *Scotland*; and it has been determined, at the *Cockpit*, upon solemn consideration, that bills by *English* assignees may be maintained in the Plantations, upon demands due to the bankrupt's

1779.

LE CHEVA-
LIER
against
LYNCH.
[171]

estate. In the case of *Wilson*, the agent (b), Lord Hardwicke went so far as to refuse to permit the Scotch creditors to come in under the commission, on the same footing with those in this country, unless they would abandon the priorities which they had obtained by the law of Scotland, as to the effects there [13]. But if in the mean time, after the bankruptcy, and before payment to the assignees, money owing to the bankrupt out of England is attached, *bonâ fide*, by regular process, according to the law of the place, the assignees, in such case, cannot recover the debt.

The rule made absolute [17].

(b) Reported 1 Atk. 128. by the name of *Richardson* and *al.* assignees of *Wilson v. Bradshaw*, 25th February 1752. But this point is not mentioned.

Ross, assignees of *Wilson*, v. *Fairholme* and another, in the collection of Decisions of the Court of Session from 1751 to 1756, p. 198.

[13] Vide the case of *Bradshaw &*

[17] Vide *Hunter v. Potts*, B. R. T. 30 Geo. 3.

Monday, 3d
May.

BIRT against BARLOW.

The Court, under particular circumstances, will permit a new trial to be moved for after the four days are expired.—In an action for crim. con. an actual marriage may be proved by a copy of the register, and the minister, clerk, or subscribing witnesses to the register, are not the only competent witnesses to prove the identity of the persons married.

THIS was an action of trespass and assault, for criminal conversation with the plaintiff's wife. It was tried before BLACKSTONE, Justice, at the last Assizes for Kent, when, by the direction of the Judge, the plaintiff was non-suited.

On Monday, the 26th of April, Rous moved for a rule to shew cause, why the nonsuit should not be set aside, and a new trial granted.

Wednesday, the 21st of April, was the first day of the term, and, by the practice of this court, all new trials, (in causes tried in vacation,) must be moved for within four days of the beginning of the term, including the first; so that Saturday, the 24th of April, was the last day for moving. However, Rous having stated that he had understood that the four days were reckoned exclusive of the first, and BLACKSTONE, Justice, having desired at the trial, that the opinion of the court should be taken, the court entertained the motion, which was founded on the ground of a misdirection in point of evidence; and the rule was granted (c).

This day BULLER, Justice, read the Judge's report, which was as follows:

The first witness called by the plaintiff was Thomas Sharpe, who proved a copy of the register of the parish of St. Alfred, Canterbury, in *hæc verba*—"1767, No. 106. "John Birt, Esq; of the parish of St. Margaret, Rochester, "Co.

(c) Vide *infra*, *Rex v. Gough*, T. 21 G. 3. p. 791.

"Co. Kent, and Harriot Champneys of this parish, married by banns 15 December 1767, by John Lynch, minister. Witnesses, Robert Lynch, Francis Champneys, Anne Lynch, Elizabeth Lynch [14]."—Another witness, (Susanna —) was next called, to prove the fact of adultery.—I was of opinion, that this was not sufficient evidence of the marriage, but that the identity of the parties must be proved, else it might possibly be a register of the marriage, not of the plaintiff and his supposed wife, but of some other persons of the same name.—The counsel for the plaintiff then said, that, in the course of their examination to prove the adulterous intercourse, it would come out from the mouths of the witnesses, that the plaintiff's reputed wife was of the name and family of Champneys, and that they have long cohabited together, and were esteemed to be man and wife by all their friends and relations.—I still thought that the evidence, so opened, would be insufficient, holding, in conformity to the case of *Morris v. Miller*, reported in 4 *Bur.* 3057 (d), (and of which I had also a manuscript note of my own,) that this was the only civil case in which proof of an actual marriage was requisite, as contradistinguished from acknowledgment by the parties, cohabitation, reputation, &c. That the best proof that could be given of an actual marriage, was by some person personally present at the solemnity, which, in my small experience, I had never seen an instance of not producing. If it did not appear that there were any persons present besides the minister [15], and he was dead, perhaps other collateral proof might be admitted, which might render probable the identity of the plaintiff and his wife, and the persons whose marriage was so registered. But that, in the present case, there appeared to have been no less than five witnesses present at the marriage thus registered, which was only eleven years ago. That the marriage act had directed the witnesses to subscribe their names to the register (e), in order to facilitate the investigation of the legal evidence of marriages.—And that till these five witnesses and the minister were accounted for, as by shewing them all dead, or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties.—I accordingly nonsuited the plaintiff. After which a proctor from the ecclesiastical court, then present, declared openly that he had been subpoenaed by the plaintiff to

1779.

BIRT
against
BARLOW.

[172]

[14] I presume the names of the husband and wife were also subscribed, although that was not stated in the report. It is expressly required by the marriage act, 26 G. 2. c. 33. § 15.

(d) *B. R. E.* 7 G. 3. Since reported, 1 *Blackst.* 632.

[15] Two witnesses at least, besides the minister, are expressly required by the marriage act. § 15.

(e) 26 G. 2. c. 36. § 15.

1779.

BIRT
against
BARLOW.
*[173]

to prove, and could prove the taking out of a licence for the marriage of the plaintiff and his reputed wife. I mention this circumstance, though it could be no ground of my determination, as it shews * *something more than a bare possibility* that the plaintiff and his wife were not the identical persons so registered as marrying by bans.

Kempe, Serjeant, and *Peckham*, shewed cause.—They argued, that the marriage act meant to introduce some more accurate proof of marriages than what was in use before the passing of that act. This purpose was expressed in the preamble to the 15th section. It had accordingly been enacted by that section, that witnesses should be present, who should subscribe their names to the register; and the purpose of such subscription must have been to point them out, that they might be produced when it should become necessary to prove the marriage. There is no case in the law where subscribing witnesses are necessary, and yet it is not necessary to produce them, or, if they are shewn to be dead, to prove their hand-writing. The register proved the marriage of two persons of the same name with the plaintiff and his wife, but could not shew that *they* were those identical persons.

Dunning, and *Rous*, in support of the rule, observed, that the preamble to the section of the marriage act relied on, professed an intention to render the proof of marriages *more easy*, and it would be a strange solecism to construe it so as to render them more difficult. It was admitted, that the proof of a marriage was complete, and no case could be shewn which had determined, that there could be no other evidence of the identity of the parties, but the testimony of persons present. Proof of the parties having been seen going to church the morning of the day mentioned in the register, or sleeping together that night, would surely be evidence of the identity, and so would proof of their having cohabited together from the time of the marriage downwards. In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient. In a case of criminal conversation, something more, viz. an *actual* marriage must be shewn. This is done by the register; and when that is coupled with evidence of cohabitation and reputation, the proof is complete. As the copy of the register only was produced (and was all that was necessary) the witnesses could not have proved their attestation, even if they had been called.

LORD MANSFIELD,—From the report, it appears, that the ground of the nonsuit was an idea, that the identity must be proved by the minister, or some of the attesting witnesses, unless their not being produced is accounted for, in the same manner, as is required in the case of sub-

scribing

scribing witnesses to a deed. The counsel for the plaintiff stated other evidence of the identity; whether such as would have been sufficient when produced, (as that might, or might not be, according to the differences arising from the manner of stating it,) I give no opinion. But the judge decided, that it was *necessary* to produce some of the subscribing witnesses. The clauses in the marriage act relative to registers are of infinite utility to the kingdom. They were meant, as well to prevent false entries, as to guard against illegal marriages without *licence*, or the publication of bans. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But, besides facilitating and ascertaining the evidence of marriages, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for 500 years back, before the time of *Charles II.* than for 100 years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act were so construed as to render the proof of marriages more difficult than formerly. I take it for granted, that the law stands as it did before in that respect. Registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, though it does not prove the identity. An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, &c. are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of *wife* to women to whom they are not married, it struck me, in the case of *Morris v. Miller*, that, in such an action, a marriage in fact must be proved. I say, a marriage in *fact*, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible, and DENNISON, *Justice*, in a case of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is sufficient to satisfy a jury, is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case, none of them might be able to prove the identity. But it may [175] be proved in a thousand other ways. Suppose the bell-ringers were called, and proved that they rung the bells, and

1779.

BIRT
against.
BARLOW.

1779.

BIRT
against
BARLOW.

and came immediately after the marriage, and were paid by the parties; suppose the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner, &c. &c.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The original register is not necessary to be produced, and it is only where *that* is required, that subscribing witnesses must be called. In this case, the wife's maiden name was *Harriot Champneys*. Suppose a maid servant had proved that she always went by that name till the day of the marriage, that she went out that day, and, on her return, and ever since, was called Mrs. *Birt*? Surely that would have been evidence of the identity.

The rule made absolute [16] [† 57].

[16] The cause was tried again, at [† 57] *Vide Hemmings v. Smith*, the ensuing Assizes, and a verdict found *B. R. M. 25 Geo. 3.* for the plaintiff.

Wednesday,
5th May.

DOE, Lessee of MATTHEWS and Others, against
JACKSON and Another.

A notice to
quit "or I
shall insist
"on double
"rent," is
good to sup-
port an ejection.
ment.

IN this ejectment, which was tried before BLACKSTONE, *Justice*, at the last assizes for *Surry*, the only question arose on the notice to quit. The demise was laid to be on the 27th of *March* 1777, to hold from the 26th of the same *March*, and the notice to quit, which was in writing, was in the following words: "I desire you to quit the possession, at *Lady-day* next, of, &c. or I shall insist upon double "rent for the same." The judge directed the jury to find a verdict for the plaintiff, but with leave to the defendant to apply to the court, without costs, for a nonsuit. This was accordingly done, and a rule to shew cause was granted, which now came on to be argued.

Peckham, for the plaintiff.—*Dunning*, *Mingoy*, and *Lane*, for the defendants.

On the part of the plaintiff, a case was mentioned, (on the relation of *Wheeler*,) which had come before *SMYTHE*, *Baron*, at *Lincoln*, where he had over-ruled the objection to a similar notice; and cited a prior case of the same sort, in which *NOEL*, *Justice*, having ruled that the notice was good, his opinion had been confirmed by the court of *Common Pleas*.

[176]

On the other side, it was contended, that it was impossible to know whether the cases referred to were parallel to this, unless the words in the notices could be shewn to have been the same. Here, the landlord had proposed an alternative

alternative to the tenant, and given him an option, *viz.* either to quit at *Lady-day*, or, (if he chose,) to hold over, paying double his then rent. It could not be supposed, but that, if the defendant, on receiving this notice, had gone, and offered to continue at double rent, the landlord would have agreed to it. It could not fairly be said, (as had been contended at the trial,) that the latter part of the notice was only meant to declare the legal consequence of holding over, since the statute of 4 *Geo. 2.* (f) does not give double *the rent*, in such cases, but double *the value*.

1779.

DOE
against
JACKSON.

LORD MANSFIELD,—That the landlord may give the tenant the alternative is clear; but the question is, what is the meaning of this notice. If it had really contained the option of a new agreement, and had said, for instance, “*Or else that you agree to pay double rent,*” the ejectment could not have been supported. But, here, the landlord does not mean to offer a new bargain. I think this very point has been settled several years ago; but if it is new, I have no doubt. The additional words only prove the landlord’s anxiety to get into possession. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he hold over. The tenant may keep him out, by defending an ejectment, and by chicane, for several months, but the notice informs him, that, in such case, the landlord will insist on the penalty. It clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords, for double rent would be no penalty on the expiration of some leases [17].

WILLES, *Justice*,—The notice is to be considered as having two parts; 1. The common notice to quit; 2. A warning to the tenant of the consequence, if he shall disobey the notice, and put the landlord to the necessity of bringing an ejectment.

ASHHURST, and BULLER, *Justices*, of the same opinion.
The rule discharged [18].

(f) C. 28. § 1.

[17] By 11 *Geo. 2. c. 19.* § 18. the penalty, when *the tenant* gives notice

that he means to quit, and does not, is *double rent*.

[18] *Vide Messenger v. Armstrong,*
B. R. M. 26 Geo. 3. 1 Term Rep. 53.

1779.

Saturday, 8th
May.

The KING *against* the MAYOR and BURGESSES
of LYME REGIS, on the prosecution of AR-
THUR RAYMOND.

On a mandamus to restore to the office of a capital burghess, if the return state the ground of the disfranchisement to have been, the non-attendance of the prosecutor at a meeting to which he was summoned for the election of a capital burghess, an averment that the right of such election is in the capital burghesses being the common council, does not assert, with sufficient certainty, that he had a right to concur in the election, and ought to have obeyed the summons, because, consistently with such an averment, he might not have that right, it not appearing thereby that all the capital burghesses are members of the common council.

* [178]

MANDAMUS to restore the prosecutor to the Office of a capital burghess.

The return stated, That *Lyme Regis* was a borough by prescription. That the mayor and burghesses had been immemorially accustomed to have, and still ought to have, within the borough, a certain guild-house, called the *Moot-hall*, or *Guild-hall*. That Queen *Elizabeth*, by letters patent of the 26th of *June*, in the 33d year of her reign, granted, (*inter alia* in the return stated,) that there should be in the said borough, a mayor and eleven burghesses in number, only, out of the burghesses of the borough or town aforesaid, [*&c.* as stated within the parenthesis, *supra*, from p. 150 to p. 151. in the case of *Francis Fane* and *John Luther*]. That the letters patent, in the particulars in the return set forth, had been accepted, and acted under to the present time. That, from the time of granting the letters patent, every capital burghess, upon his admission into the office, had been accustomed to take [the same oath, and in the same manner, and set forth in *hac verba*, as in the case of *Fane* and *Luther*, *supra*, p. 149]. That the prosecutor was elected a capital burghess on the 27th of *August* 1759, and sworn in on the same day. That, on the 10th of *August* 1778, the the mayor duly appointed a meeting or convocation of the mayor and capital burghesses, to be holden at the council chamber within the *Moot-hall* or *Guild-hall*, on the 15th of *August*, at eleven o'clock in the forenoon, to elect one of the burghesses into the office of a capital burghess, in the room of *Henry Fane* deceased. That, before the 15th of *August*, he caused due notice to be given to all the capital burghesses, within the reach of summons, of his having appointed such meeting, and caused such due notice to be given on the 11th of *August*, to the prosecutor in person, whereby he summoned him to attend at the council chamber, within the *Moot-hall*, at the said meeting. That, on the 15th of *August*, the mayor, and *George Kirby*, and *Robert Clarke*, two of the capital burghesses, met at the council-chamber for the purpose of holding a meeting of the mayor and capital burghesses according to the notice, for the election of a capital burghess in the room of the said * *Henry Fane* deceased, but that they not being a sufficient number for that purpose, and because a sufficient number did not then and there appear, to hold such meeting, none could be or was then held, and that the

the prosecutor did not attend or appear at the hour of eleven, nor at any time on that day, according to the appointment and notice, but, contriving and designing, wilfully to prevent the mayor and capital burgeses from holding such meeting for the purpose aforesaid, did wilfully absent himself from the council-chamber during the whole day, and did, on the said day mentioned, combine with the Hon. *Henry Fane*, (and six others, by name,) being, or claiming to be, capital burgeses, and having also before received notice [18] of the said meeting, to prevent such meeting from being held, and that, in prosecution of such combination, they wilfully absented themselves from the council-chamber during the whole of the said 15th of *August*; and that, by reason of the absence of the prosecutor, and of a number of other capital burgeses sufficient to proceed to the election, no meeting for the said purpose could be or was held on the 15th of *August*, according to the appointment and notice. That the mayor, on the said 15th of *August*, duly appointed another meeting to be held at the council-chamber, on the 21st of *August*, for the same purpose [Then the same allegations with regard to the meeting appointed for the 21st of *August*, as those above stated, excepting that the charge of combination was not repeated]: And that the prosecutor, by his said wilfully absenting himself from the said several meetings so appointed for the 15th and 21st of *August*, and by his said combination, did wilfully neglect and violate the duty and execution of his office, contrary to the duty thereof, and the obligation of his oath. That, at a meeting of the mayor and burgeses, held according to the immemorial custom of the borough, at the *Moot-hall*, or *Guild-hall*, on the 31st of *August* 1778, *John Coad*, one of the capital burgeses, exhibited certain articles of complaint against the prosecutor, and, by the second (g) of the said articles, charged him with having received previous and due notice, and with having been duly summoned to appear at a meeting of the mayor and capital burgeses [*&c.* stating the circumstances relative to the meeting of the 15th of *August*, in the manner before alleged in his return, with the omission of the charge of combination (h)]. And that the said *Coad*, by the third of the said articles [*&c.* stating in like manner the circumstances relative to the meeting of the 21st of *August*]. And that, thereupon, at the said meeting of the 31st of *August*, it was ordered, that a copy [*&c.* stating precisely the same proceedings as in the cases of *Francis Fane* and *John Luther*.

1779:

The KING
against
LYME
REGIS.

[179]

[18] There was no allegation that they had been summoned, *Infra*, p. 179. Note (m).

(g) This was one of the returns

which had been amended. *Supra*. *Rex v. Lyme Regis* on the prosecution of the Hon. *Henry Fane*, p. 135 to 137.

(h) *Infra*, p. 180. Note (p).

1779.
The KING
against
LYME
REGIS.

ther (i)]. That the mayor and burgesses had adjudged that *Raymond* was guilty of the absences, contempts, neglects, breaches of duty, misbehaviours, and other matters and things objected and charged against him, by the second and third articles of the said complaint. That he had not shewn any just cause, &c. that the mayor and burgesses had thereupon resolved, that for, &c. he ought to be removed, and did then and there remove him, and that he had not since, &c. and that for these reasons, &c.

Rooke, for the prosecutor, insisted, that, in order to support the disfranchisement, for wilfully disobeying the summons of the mayor to attend an election of a capital burgess, it was incumbent on the defendants to shew; 1. That *Raymond's* attendance was necessary; 2. That he knew it to be so; and, 3. That the charges against him were sufficiently clear for him to be able to prepare and make his defence. 1. It did not appear, by the return, that his presence was necessary, for the election to fill vacancies in the office of capital burgesses was there stated to be "by the other capital burgesses being the common council," or "by the rest of the council" (i). It was not stated that all the capital burgesses were of the common council, nor that *Raymond* himself was. If the whole of the charter had been fairly stated in the return, it would have appeared that only six of the capital burgesses were of the council. Even if they had alleged that all the capital burgesses were of the common council, that would not have been sufficient, without going on to allege, that *Raymond* was of it, for, without such allegation, his being so would only appear argumentatively; *Rex v. Mayor of Hereford* (k), *Rex v. Stevens* (l). They ought to have stated how many would have made a majority, so that, if *Raymond* had been present, an election might have been had. They should also have set forth, that the persons with whom he was charged to have combined were summoned to attend (m). 2. It ought to have been shewn that he knew his presence was necessary, the word wilfully not being a sufficient allegation, for it only expresses an inference of law; *Rex v. Richardson* (n), *Clegg's Case* (o). 3. There is nothing said in the articles about combination (p), therefore he could not be prepared to answer that part of the offence stated in the return. The words "contriving and fraudulently designing" "wilfully to prevent," &c. are only inducement, and do not amount to a positive charge, and, in a case like this, as in indictments, the charge ought to be direct; *Rex v.*

Whitehead

(i) *Supra*, p. 152, 153.

(k) *M. 3 Ann. 6 Mod. 309.*

(l) *Qu.*

(m) *Supra*, p. 178. Note [18].

(n) 1 *Burr.* 517.

(o) *H. 32 Geo. 2. Rex v. Liverpool*, on the prosecution of *Clegg*, 2 *Burr.* 723. 731.

(p) *Supra*, p. 178. Note (b).

Whitehead (q), 2 *Hawk. c.* 25. . 60. *Raymond's* offence, as stated, was in the character of a member of the council, not as a capital burghess, and therefore he ought not to have been removed from the office of a capital burghess.

Lawrence, on the other side, contended, 1. That the court could not go out of the return, and consider any supposed part of the charter not stated there. By the charter, as there set forth, three provisions were made concerning the appointment of capital burghesses. 1st, A mayor and eleven capital burghesses were created by name, 2^{dly}, Four were to be chosen by the mayor and the majority of the eleven, and when one of those sixteen should die or be removed, it was to be lawful for the other capital burghesses, being the common council, or the greater part of them, to elect another. 3^{dly}, When, afterwards, the place of any of the sixteen became vacant, it was to be filled up by the rest of the council, or the majority of them. The charter then goes on to say, that it should be lawful for the mayor and capital burghesses to appoint a guild or council-house, and "that the said mayor and capital burghesses, the common council" of the borough or town aforesaid, or the majority, should "and might hold in the Moot-hall, a convocation of the" same mayor and capital burghesses, or the greater part of "them (r)." All this shews clearly, that all the capital burghesses are of the common council. The expression of "the said mayor and capital burghesses the common council," is to be applied by necessary reference of the former part of the sentence, where the words "mayor and capital burghesses" only are used. By the oath, which is stated as necessary to be taken by all the capital burghesses, they swear to keep secret what is done in the council house. 2. The question whether *Raymond's* presence was necessary, depends on the former, whether, as a capital burghess, he had a vote in the election, and therefore, from the arguments which prove that he had a vote, the necessity of his presence follows of course. 3. The words "contriving and fraudulently designing," &c. are not mere inducement, but of the essence of the charge. In all cases where the degree of criminality is in question, that form of words is proper and sufficient. In an action for a malicious prosecution, it is sufficient to say "contriving and maliciously intending," although malice is essential to ground that action. In an indictment for an assault with intent to commit a rape, or to stab, it is sufficient to say that the party "intending and contriving," &c. Confederacy was no part of the accusation, which was only wilfully absentsing himself to prevent an election, and the question was, whether that was a sufficient ground for disfranchisement. It appeared that a majority had been

1779.

The KING
against
LYME
REGIS.

[181]

(q) T. 5 W. & M. 1 Salk. 371.

(r) *Supra*, p. 151.

1779.

The KING
against
LYME
REGIS.

been summoned, and it would be strange doctrine to say, that because, by the non-attendance of a sufficient number of others, no election could have been had, the prosecutor should therefore pass unpunished for his non-attendance. In the case of the *Mayor of Hereford* it did not appear that the majority could elect, and it might there have been necessary that two-thirds, &c. should concur.

LORD MANSFIELD, — Undoubtedly the principle is true, that returns must be certain, and not argumentative. In the case of *Rex v. The Mayor of Hereford*, it seems very strict to consider the return as argumentative for the reason there mentioned. But the ground suggested by Mr. Lawrence, for the decision in that case, seems a very good one. I doubted, for some time, on the question, whether, in the present case, it is sufficiently shewn in the return, that *Raymond* was of the common council. That he should be of it, is of the essence of the crime for which he is stated to have been removed. There are three parts of the charter which go to shew, that the council consists of *all* the capital burgesses, and that the expressions "common council" and "capital burgesses," are synonymous, viz. 1. "capital burgesses being the common council." — It is not "capital burgesses being of the common council." 2. If a capital burgess die, or is removed, a new one is to be chosen, "by the rest of the council, or the greater part of them." 3. The passage mentioned by Mr. Lawrence, relative to the meeting or convocation. But still all those passages and expressions are ambiguous. They afford a strong inference in point of language. But are they sufficient in this charter to constitute a common council composed of *all* the capital burgesses? I think not, because the charter refers to a previous known constitution. The council might be created by prescription, or a former charter, to which this charter refers. If so, the constitution of the council by such prescription, or previous charter, should have been set forth. It would be difficult to maintain an action on this, as a false return, if the council, by the charter, consists of a *part* only, for the return does not say that the council is constituted by the charter. — As to the cause stated for the motion, there is a great difference between a *charge* as the ground of disfranchisement, and an *indictment*. In criminal prosecutions, technical forms are established, and ought to be followed. If, in an indictment, you say that *A.* forged, and caused to be forged, the proof of either fact will support the indictment; but to say that he forged, or caused to be forged, would be bad. This, being determined, must be adhered to. But such nicety is not required in accusations against a corporator in a corporate court. There substantial certainty is all that is necessary; and, in the present case, there is no doubt but the

[182]

the intent is charged as part of the crime, and sufficient notice is alleged to have been given to *Raymond* to prepare to answer it.

WILLES, *Justice*, of the same opinion on both points stated by Lord MANSFIELD.

ASHHURST, *Justice*, of the same opinion on the point of uncertainty concerning the constituent members of the council.

BULLER, *Justice*, also of the same opinion on that point—He said nothing on the other.

Judgment, that the return be quashed, and a peremptory *mandamus* issue [19].

1779.

The KING
against
LYME
REGIS.

[19] The returns in the cases of *Francis Fane*, *John Luther*, and several others, (*supra* p. 144. 154.) were quashed, on a motion made for that purpose, immediately after the decision of the present case. It was stated, on the part of the prosecutors, that, by the returns in those cases where the disfranchisement had been for non-residence, the prescriptive necessity of residence only applied to the council, and, as it was not directly averred that the

prosecutors were of the council, the non-residence might be no offence in them.—Lord Mansfield said, there was no getting over the objection, and that the averment, that, since the charter, the council had consisted of the mayor, and capital burghesses (a), was not sufficient, as it did not appear that all the sixteen came to be of the council, which before the charter was stated to consist only of eleven.

(a) *Supra*, p. 151.

HOLFORD against HATCH.

[183]

Saturday,
8th May.
A landlord
cannot maintain an action
of covenant,
for rent, against an under-tenant.

THIS was an action of covenant, for rent in arrear, brought against the defendant as assignee of one *Saunders*. The declaration stated, (in the common form,) that the plaintiff demised to *Saunders* for seven years, by virtue whereof he entered and was possessed, and that afterwards, all the estate, right, title, and interest, of *Saunders*, in the premises, came to the defendant, by assignment thereof, by virtue whereof he entered and was possessed, and that, after the assignment, rent had become due, which the defendant had not paid. The defendant pleaded, that all the estate, right, title, and interest, of *Saunders* in the premises, did not come to him by assignment thereof in manner and form as the plaintiff had alleged.

On the trial, it appeared, that the defendant was in possession of the premises during the time when the rent in arrear became due, but that, by the deed under which he held, they were conveyed to him, by *Saunders*, for a day, or some days less than the original term, and that he had actually surrendered them before the action was brought.

1779.

HOLFORD
against
HATCH.

Some receipts also were produced for rent which had been paid by the defendant to the plaintiff, and which run thus: "Received of *Saunders* by the hands of *Hatch*."

Upon this evidence, it was contended, at the trial, which came on before Lord MANSFIELD, at the Sittings for *Middlesex*, in last *Hilary Term*; 1. That, in point of law, a person holding of the first lessee, by an under-lease, like the present, is not liable to be sued by the original lessor, on the covenant for rent contained in the original lease; 2. That the fact put in issue on the record, *viz.* that all the estate, &c. of *Saunders* came to the defendant, was not proved.

A verdict was found for the plaintiff, but Lord MANSFIELD saved the points made by the defendant's counsel, for the opinion of the court. Accordingly, in *Hilary Term*, (*Thursday*, the 4th of *February*,) *Davenport* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered. He cited *Poultney v. Holmes* (r), *Cruise v. Bugby* (s), and *Hare v. Cator* (t).

[184.]

Cause was shewn, on *Thursday* following, (the 11th of *February*.) The *Solicitor General*, for the plaintiff.—*Dunning* and *Davenport*, for the defendant.

For the plaintiff, it was contended, 1. That the covenant for rent being one of those which run with the land, every person who takes under the original lease is liable to it. To this purpose, the defendant, although he had not strictly taken the whole of the first lessee's interest in point of duration, was to be considered as his assignee. All that had been determined by the case of *Cruise v. Bugby*, was only, that a lease by the original lessee, for a shorter time than his own, was not such an assignment as would produce a forfeiture, under a covenant not to assign (v). Many modes in which the interest may be transferred, though not assignments within the meaning of such a covenant, are considered as assignments, with respect to the covenants which run with the land. A devisee, an executor, an assignee under the bankrupt laws, or one who purchases the term from the sheriff under an execution, are assignees in law, to the effect of being liable to covenants for rent, &c. although the transfer to them does not amount to a forfeiture under a covenant not to assign [20].

The

(r) *M. 7 G. 3.* at *N. Pr.* before *Pratt, Ch. Just.* 1 *Str.* 405.

(s) *C. B. T. 11 G. 3.* 3 *Wils.* 234. Since reported 2 *Blackst.* 766.

(t) *B. R. E. 18 G. 3.* [† 58]. *Vide infra*, Note (21), p. 184.

(u) *S. P. Kinnerley v. Orpe*, *infra*, 56.

[23] This point, which was taken for granted on this argument, and by the court in *Cruise v. Bugby*, according to *Wilson's* report of the judgment in

The landlord is entitled to look for the rent to the person in possession, and ought not to be driven to the necessity of finding out the original lessee, and bringing his action against him. *Poulteney v. Holmes* does not apply to this case, for the question there was only, whether a parol agreement by the original lessee, to transfer the remaining interest in a term of more than three years, when there was only a year and a half to run, reserving the rent to himself, not to the reversioner, was void within the meaning of the statute of frauds (v). *Hare v. Cator* [21] was determined on the ground that the defendant was charged for the whole rent, and as assignee of *all* the premises, when, on the evidence, it appeared, that only part of them had been assigned; where, in the present case, the *whole* premises had been made over. 2. That, as, to the second point, it went merely to the *form* of the issue; but, if the question of law was in favour of the plaintiff, it was enough for him to prove the *substance*, viz. that the defendant had enough of the term transferred to him, to make him liable, under the covenant, for the rent demanded by the action. On this head *Pope v. Skynner* (w), and a case put in the text of *Littleton* (x), were, it was said, in point. In the first, in an action of replevin, the defendant having avowed that he had taken the plaintiff's cattle *damage feasant*, the plaintiff pleaded, in bar, that *A*, being seised of a house and land to which common in the *locus in quo* was appendant, had demised the same to him on the 30th of *March*, to hold *from the 26th of March, &c.* and the defendant traversed the lease *modo et forma*, upon which issue being taken, and the jury having found a lease made on the 25th of *March*, to hold *from thence next ensuing*, the court

1779.

HOLFORD
against
HATCH.

[185]

that case (3 *Will.* 237), has been since very much agitated, in *Denn, Lessee of Earl Stanhope, v. Skeggs*, T. 21 G. 3. [C].

(v) 29 *Car. 2. c. 3. § 1, 2, 3.*

[21] *Hare v. Cator* was argued, on a case reserved, by *Morris* for the plaintiff, who relied on *Broome v. Hoare*, 1 *Cro.* 633. and by *Davenport* for the

defendant.—Lord MANSFIELD in delivering the opinion of the court in favour of the defendant, said, that the case in *Croke* did not apply, and that the objection was unanswerable.

(w) *Cam. Seacc. T. 12 Jac. 1. Hob.* 72.

(x) § 483. *Co. Litt.* 281. a, b.

[C] In *Roe, Lessee of Hunter, v. Galhies*, B. R. M. 28 *Geo. 3.* On a special verdict, a proviso,—that a lease should become void, upon the lessee's committing an act of bankruptcy and being found a bankrupt,—was held to be

good; and that under such a proviso, in case of a bankruptcy, and commission, the lease shall be avoided, and the lessor may re-enter. 2 *Term Rep.* 133.

1779.
 HOLFORD
 against
 HATCH.

court thought that this was not the same lease [22], and yet gave judgment for the plaintiff, because the *substance* of the issue was, whether the plaintiff had such a lease as by force thereof he might use the common at the time (y). The case put by *Littleton* is equally strong, for he there supposes the demandant in a writ of entry in *casu provisio*, to count of an alienation *in fee* made by the tenant in dower, and the tenant to plead that he did not alien *modo et forma*, &c. and the jury, (on issue being joined,) to find an alienation *in tail*, or *pur auter vie*, and then says, that although the alienation found would not be in manner, &c. yet the demandant should recover.

On the other side, it was insisted, 1. That the case of *Crusoe v. Bugby* was in point. There is not a better known distinction in the law than that between an assignee and an under-tenant. Only assignees of the whole term, whether by *actual* assignment, by devise, sale under an execution, &c. are liable to the covenants for rent, &c. for, if there is a reversion of a day reserved by the immediate lessor, there is no privity between the under-tenant and the first lessor. The plaintiff seems to have acknowledged this, by the form of the receipts he has given for the rent, which has been paid to him by defendant in order to save the circuitry of an intervening payment to *Saunders*. While the defendant continued in possession, the plaintiff might have distrained upon him for the rent then due, but as he has permitted him to quit the premises without using that process, he cannot now substitute this action of covenant in its place. Even a court of equity would not assist in a case like this, as appears by two cases mentioned in *Bacon's Abr. Title Lease* (x), and reported in *Vernon*, viz. *Sparkes v. Smith* (a), and *Pilkington v. Shaller* (b). 2. That, by the issue, the plaintiff had affirmed that the *whole* of *Saunders's* estate, &c. had come to the defendant, but the proof was, that only *part* of the term had been conveyed. Surely this proof can as little support such an issue, as evidence of only part of the premises having been assigned, which was the case of *Hare v. Cator*. The only allegation consonant

[186]

[22] One of the variances mentioned by *Hobart* is, that the lease pleaded was *exclusive*, and *that* found by the jury *inclusive*, of the 25th of March. This may therefore be added to the series of cases enumerated by Lord MANSFIELD in his argument in *Pugh v. the Duke of Leeds* (*) in which "from the

"day," had been supposed to *exclude*, and *from henceforth*, or "from the date," to include the day.

(y) Vide *Bristol v. Wright*, E. 21 Geo. 3. *Infra*, y. 665.

(x) Vol. iii. 389.

(a) *Canc. M.* 1692. 2 *Vern.* 275.

(b) *Canc. T.* 1770. 2 *Vern.* 374.

(*) Mentioned *supra*, p. 53, Note [15].

to the truth of the present case would have been, "You have been in possession under *Saunders*, and thereby became liable for the rent, which accrued during your possession," but, if the plaintiff had stated his demand in that manner, it would have been demurred to. If an under-tenant were to pay the rent to the original lessor, he could not plead that payment in bar to an action by his immediate landlord, nor set it off, because there might be mutual accounts between the original lessor and lessee, and the former might have been, at the time of the payment made to him, indebted, on the balance, to the latter.

BULLER, *Justice*, put this case:—Suppose a lease for 21 years, and that the reversioner aliens his reversion in parts, viz. for 40 years immediately, to one, and in remainder in fee, to another. By the covenant for rent, it is to be paid by the lessee and his assigns, to the lessor and his assigns. Now could not the assignee of the reversion for 40 years, which is only part of the original lessor's interest, maintain an action on the covenant?—To this it was answered, that the cases were not parallel, for that, in the case put, there was no middle man to whom the lessee could be answerable. That, to make them correspond, the privity between the original lessee and lessor in the case before the court must be annihilated. BULLER, *Justice*, then observed, that, in the case he had supposed, that privity was not at an end, for that the original lessor would still remain liable to the tenant, under a covenant to repair, &c.

LORD MANSFIELD, —It is fit that we should look into the authorities; therefore let the case stand over.

[187]

The court were understood to be for some time divided, and judgment was not given till this day, when Lord MANSFIELD delivered their unanimous opinion, as follows:

LORD MANSFIELD, —This is an action of covenant by a lessor against an under-lessee, and the single question is, whether the action can be maintained against him, as being, substantially, an assignee. For some time, we had great doubts; we have bestowed a great deal of consideration on the subject, and looked fully into the books, and it is clearly settled, (and is agreeable to the text of *Littleton*,) that the action cannot be maintained, unless against an assignee of the whole term.

The rule made absolute [† 59].

[† 59] The following case has been since determined:

PALMER v. EDWARDS and Another,
B. R. E. 23 Feb. 3.

This was an action of covenant brought by the plaintiff as assignee of a

term, against the defendant as assignee of the lessor, for not finding, providing, assigning, and allowing, proper wood and timber for repairing the demised premises.

The declaration stated, that one Richard Edwards, being, on the 30th of September

1779.

HOLFO RD
against
HATCH.

1779.
HOLFORD
against
HATCH.

September 1751, possessed, among other things, of certain premises particularly specified, for a long term of years then and yet to come, did, on that day and year, demise to one *Edmonson*, his executors, administrators and assigns, among other things, the said specified premises, to hold from *Lady-day* then next ensuing, for 30 years, at a certain yearly rent in the indenture of demise mentioned; that *Edmonson*, for himself, his executors, administrators and assigns, by the said indenture covenanted, promised, granted and agreed, that they would, at their own proper costs and charges, (wood and timber excepted,) repair and keep in repair during the said term, among other things, the said specified premises; and that *Richard Edwards*, for himself, his executors, administrators and assigns, by the said indenture, covenanted, promised, granted and agreed, that they would find, provide, assign, and allow, proper wood and timber, when they should be required, for repairing, among other things, the said specified premises, during the said term; that, on the said day and year, *Edmonson*, by virtue of the said indenture, entered on all the said demised premises, and, afterwards, to wit, on the 21st of January 1752, assigned, transferred, and set over, by indenture, to one *Warner*, his executors, administrators and assigns, the said specified premises, to hold from *Lady-day* then next ensuing, for 30 years; and that *Warner*, by virtue of the said last-mentioned indenture, entered into the said demised premises. Then a title was derived, by many mean assignments, from *Warner* to the plaintiff, and it was also shewn, that *Richard Edwards's* reversionary leasehold interest came, by assignment, to the defendants; and then a breach of the covenant for finding and allowing timber, since the respective titles of the plaintiff and defendants had accrued, was assigned.

The defendants pleaded, 1. that *Edmonson* did not assign, transfer, and

set over, to *Warner*, the said, &c. (specifying the same premises specified in the declaration,) in manner and form, &c. 2, 3, 4. three other pleas on which no question arose, 5. performance.

Issue was joined on each of those pleas, and, the cause came on for trial before *Eyre*, Baron, at the Lent Assizes for *Huntingdonshire*, 23 Geo. 3.

Upon the evidence, it appeared that the original lease was of certain tenements, including those in the declaration specified, at a rent of 149*l.* 7*s.* 10*d.* and that it contained, among other covenants, one, on the part of *Edmonson*, to repair; and another, on the part of *Edwards*, to find timber, as stated in the declaration.

The indenture between *Edmonson* and *Warner*, reciting the lease, witnessed, that *Edmonson* assigned all and singular, &c. (viz. that part of the premises specified in the declaration,) to *Warner*, his executors, administrators, and assigns, subject [188] to the exceptions, reservations, and agreements aforesaid,) at the yearly rent of 26*l.* 2*s.* payable to *Edmonson*. Then there was a covenant, by *Warner*, for himself, his executors, administrators, and assigns, to repair at their own proper costs and charges, (wood and timber excepted,) and a power of *Edmonson* to re-enter on non-payment of rent. There were also several other covenants, which were admitted at the bar to be different from those in the original lease.

A verdict having been found for the plaintiff on all the issues, a new trial was moved for, on two grounds; 1. that the rent was reserved to *Edmonson*; 2. that the covenants in the indenture between *Edmonson* and *Warner* were not the same with those in the original lease.

Partridge, in support of the verdict, contended, that, wherever the whole interest is conveyed, it is an assignment, and that, in such case, the assignee stands exactly in the place of the lessee, and is entitled to the benefit of all the covenants on the part of the lessor.

Cole, and *Davenport*, for the defendants, relied on *Poultney v. Holmes*, and

and insisted, that this was not an assignment, because the rent was not reserved to the first lessor, but to *Edmonson*, and because a power of re-entry was given to *Edmonson*. That those circumstances constituted *Edmonson* the landlord of *Warner*; and that, if an action of covenant were to be brought by the defendants, against *Palmer*, for not repairing, he might plead that he was not assignee.

Lord Mansfield, and Ashurst, Justice, absent.

Buller, Justice.—It may be a question, whether the new covenants in the conveyance from *Edmonson* to *Warner* are good. On this I give no opinion. But certainly that was an assignment. There was no reversion left. There is no doubt but there is sufficient privity for the defendants, as assignees of

the reversion, to maintain an action on the covenants in the original lease, against *Palmer*, and that the remedy is mutual, so as to entitle *Palmer* to the advantage of the original covenants on the part of the lessor. The case of *Poultney v. Holmes* does not come up to this. That case only determined, that what cannot be supported as an assignment, shall be good as an underlease, against the party granting it.

Willes, Justice, concurred in the same opinion.

The rule discharged.

Vide Eaton v. Jaques, M. 21 Geo. 3, *Infra*, 455. *Walker v. Reeves*, M. 22 Geo. 3. *Infra*, 461. Note [1]. *Wadham v. Marlow*, B. R. M. 25 Geo. 3.

1779.

HOLFORD
against
HATCH.

The KING against PUGH,

Saturday,
8th May.

THIS was a case reserved upon an indictment on the statute of 3 & 4 Ann. c. 18. § 5. against the defendant, as high constable of the hundred of *Battle*, in the county of *Suffex*, for not obeying a warrant of the justices in quarter sessions, by which he was commanded to issue his precepts to the petty constables, head-boroughs, and tything men, of and belonging to the respective boroughs of the said hundred of *Battle*, for the purpose of preparing lists of persons qualified to serve on juries, &c. and for not returning such lists to the said justices, at the *Michaelmas* sessions following. The indictment had been removed by *certiorari* from the quarter sessions, and was tried at the last Assizes for *Suffex*. The case set forth;—That the defendant had been legally appointed to his office; that a warrant, (stated in *hæc verba*,) issued at the *Midsummer* sessions; that he was duly served with it, and neglected and failed to issue forth his precepts, &c. That *William I.* when he founded the abbey, granted, among other things, “*quod habeat curiam suam per omnia, & regiam libertatem*” “*& consuetudinem tractandi de suis rebus vel negotiis, & justitiam per se tenendam*,” sanctuary for felons, freedom from all episcopal jurisdictions, &c. That *Henry I.* by two several charters, (part of which were set forth,) confirmed the privileges granted by *William I.* That *Henry VIII.* granted

If the inhabitants of an hundred have enjoyed an immemorial exemption from serving on juries, they are not liable to be summoned, under any of the different statutes relative to jurors.

[189]

1779.
The KING
against
PUGH.

granted the maner and hundred of *Battle-Abbey* to Sir *Anthony Brown*, his heirs and assigns, with power to hold such views of frank-pledge, court-leet, hundred-courts, law-days, sokes, returns of writs, cognizances of pleas, and other rights, jurisdictions, powers, liberties, &c. as the late abbot, or any of his predecessors had held and enjoyed, in right of the said *abbey*. That under this grant, the manor and hundred had come by various mesne assignments to the present proprietor Sir *Whistler Webster*, Bart. That the defendant lived within the manor. That the manor and hundred are co-extensive. That there had been a court of record regularly held within the manor till the year 1744. That, by immemorial custom, the residents within the hundred had not been returned to serve on juries out of the hundred; and that no precepts had ever been issued, from time immemorial, by the high constable of *Battle*. That no proof was given of any allowance of this privilege. That the town of *Battle* is not a town corporate, that has power by charter to hold sessions of gaol-delivery, or sessions of the peace for such town.—The defendant was found guilty, subject to the opinion of the court on the following question, *viz.* “Whether the above charters and “immemorial custom would exempt the inhabitants of “the hundred of *Battle* from serving on juries, and the “high constable from issuing his precepts? or, Whether “the several acts of parliament passed, and now in force, “concerning jurors, or some, or one of them, have not “taken away such exemption?”

The case was argued on *Wednesday*, the 5th of *May*.—*Burrell*, for the prosecution.—*Peckham*, for the defendant.

In support of the prosecution, it was contended, that the statutes of 4 & 5 *W. & M. c. 24.* (c) 7 & 8 *W. 3. c. 32.* (d) and 3 & 4 *Ann. c. 18.* (e) are general, without any exception as to liberties or local exemptions, unless with regard to cities, boroughs and towns corporate (f), and, therefore, they must be considered as having taken away the privilege claimed by the inhabitants of the hundred of *Battle*, if it ever had a legal existence. This construction of those statutes was, it was said, consonant to the interpretation which had obtained in respect to the statute of *bridges and highways* (g), for the words in the fourth section of that statute, having given authority “to “tax and set every inhabitant,” Lord *Coke* expressly says, in his commentary upon it, that, “by these words, all “privileges of exemptions or discharges whatsoever from “con-

(c) § 15, 16.
(d) § 4.
(e) § 5.

(f) 4 & 5 *W. & M. c. 24.* § 17.
(g) 22 *Hen. 8. c. 5.*

"contribution for the reparation of decayed bridges, (if any were,) are taken away," and even adds, "although the exemption were by act of parliament (b)."

For the defendant, it was insisted, that it is a general rule, that an affirmative statute does not take away a custom (i). Many particular decisions which establish and confirm that rule, might be cited. For example, by the statute of 1 Ed. 3. st. 2. cap. 2. it is enacted, "That every man that hath any wood within the forest may take house-bote and hay-bote in his said wood, so that he doth the same by the view of the foresters;" and yet, notwithstanding that restriction, a prescription to cut down timber trees in the party's own woods, within a forest, without the view of the forester, was held good, in a case in 16 Eliz. stated 4 Inst. 297. (k). The passage in Lord Coke's commentary on the statute of bridges does not apply, because the words of that statute are much broader, and more comprehensive, than those of the different acts relative to jurors. The principal object of the statute of 4 & 5 W. & M. (in that part of it which has been relied on,) was to revive that of 16 & 17 Car. 2. c. 3. with regard to the qualification of jurors in point of estate. The purpose of those of 7 & 8 W. 3. c. 32. and 4 Ann. c. 3. was to provide a method of giving the sheriff authentic information of the persons qualified; but, from a careful perusal of those different statutes, it would appear, that it was never intended thereby to subject persons, who had a right of exemption to serve. Such exemptions are very common. Tenants in ancient demesne "cannot be empannelled to appear at Westminster or elsewhere in any other court upon any inquest or trial of any cause (l)." So clergymen, (*Beecher's Case*) (m), coroners, officers, of the forest, officers in the army, and other officers, and ministers belonging to the King, are not liable to be summoned on juries; *Bacon's Abr. Title Juries* (n); and by the statute of 52 Hen. 3. c. 14. though it is provided, that, in particular cases, persons privileged by charters of exemption, shall, notwithstanding, be sworn on juries, yet their general liberty and exemption is saved, which affords a strong proof of the antiquity of this sort of privilege.

Burrel, in reply, observed, that, if it were to be held that the exemption claimed was well founded, still that was not a sufficient justification of the defendant, because his office, in the execution of the warrant, was only ministerial;

1779.

The KING
against
FUGG.

[191]

(b) 2 Inst. 704.

(i) Co. Lit. 115. a.

(k) Also Co. Litt. 115. a.

(l) 4 Inst. 269.

(m) B. M. B. 19. Eliz. 4 Leon. 190.

(n) Vol. iii. p. 261. cites *Dali.*
Sher. 121. *Trials per pais* 86.

1779.

The KING
against
PUGH.

nisterial [23]; but *Peckham* having answered, that the point of the exemption was the only question meant to be tried and brought on upon the case reserved, this seemed to be acquiesced in.

The court took time to consider, and now Lord MANSFIELD delivered their opinion, as follows :

Lord MANSFIELD, — We have considered this matter very fully, and we are all of opinion, that the statutes relative to juries, being affirmative, do not take away the prior exemption; and so is the text of *Littleton*.

A verdict of acquittal entered for the defendant.

[23] *Vide Rex v. Percival, R. R. H. 16 & 17 Car. 2. Hardr. 389. Sid. 243.*

Tuesday,
11th May.

The KING against the JUSTICES of GLOUCESTERSHIRE.

The justices are bound to receive an appeal against an order of removal if offered at the next sessions, although notice of appeal has been given.

ON an application for a *mandamus* to compel the justices of the Quarter Session in *Gloucestershire* to receive an appeal from an order of removal, it appeared, from the affidavits on which the rule was obtained, that the examination of the pauper was taken in *August*; the order of removal dated the 12th of *November* following; and the Sessions, where the appeal was tendered, held on the 12th of *January* in the ensuing year; that no notice of appeal had been served, (for which the reason assigned was, that the appellants had not been able to get their witnesses ready, till it was too late to give such notice); that the court had been moved to receive the appeal, and adjourn the consideration of it till the following Sessions, and had refused.

Dunning now shewed cause. — *Morris* for the prosecutor.

The court were clearly of opinion, that the justices ought to have received the appeal.

The rule made absolute.

[192]

Tuesday,
11th May.

ALSOP and Another against BROWN.

If a bond for the payment of money has been forfeited before a bankruptcy, payment of interest by the bankrupt after the certificate, may perhaps render him liable to be sued upon it.

THIS was an action on a bond, to the trustees under *Samuel Wilson's* will, in which the defendant pleaded a bankruptcy, as was done in the case of *Alsop v. Price* (o); but here, the defendant was the *principal*. The cause had been tried before BULLER, *Justice*, and a special case reserved,

(o) *Vide supra*, p. 160.

served, which was this day spoken to, by *Davenport*, for the plaintiffs, and *Morgan*, for the defendant. It was stated in the case, that interest had been paid on the bond, after the defendant had obtained his certificate, but it did not appear whether such interest was paid by the bankrupt, or one of the sureties. Lord MANSFIELD said, that, if the interest was not paid by the bankrupt, there was no question, but that if it was, it would be an admission by him, that the principal was then due, and he might be liable as on a new contract [24.] The case was ordered to stand over, till *affidavits* should be laid before the court, stating by whom the interest was paid; but I believe it was never brought on again.

1779.

ALSO
against
BROWN.

[24] *Vide Webster v. Bannister, E. v. Wilkes, M. 21 Geo. 3. Infra, 519 20 Geo. 3. Infra, 393, and Wyllie* [† 60].

[† 60] *Vide, also, Best v. Barber, B. R. M. 23 Geo. 3. cited supra, p. 101. Note* [† 42].

The KING *against* the JUSTICES of the East Riding of YORKSHIRE.

* [193]

THIS was an application for a *mandamus* to compel the court of Quarter Sessions to receive an appeal against an order of removal.

The facts of the case were these: The order of removal had been made by the two justices on the 22d of *September*, but the pauper was not removed till the 5th of *October*. *Hull*, (the place to which the pauper had been removed from *Whitby*,) is sixty miles from *Northallerton*, where the Sessions began on the 6th of *October*. At that Sessions, no appeal was entered, and, at the *Epiphany* Sessions following, (which began on the 12th of * *January*,) the parish charged having offered an appeal, the justices refused to hear it, thinking themselves bound by the words of the statute of 13 & 14 *Car. 2. c. 12. § 2.* which says, that persons aggrieved may appeal to the justices of peace "at the next Quarter Sessions."

Lee shewed cause, and insisted, that the succeeding Sessions had no jurisdiction; that an appeal might have been entered at the *Michaelmas* Sessions, on the second or third day, for that no notice is necessary in order to entitle the parties to enter the appeal (p), although, if there has not been any, or not reasonable notice, the justices are bound to adjourn the hearing till the ensuing Sessions (q).

The

If, from the distance between the parish to which a pauper has been removed and the place where the sessions are held, there is not time to lodge an appeal at the sessions held immediately subsequent to the removal, the sessions next ensuing, are to be considered as the next sessions within the statute of 13 & 14 *Car. 2. c. 12.* and the justices will be compelled to receive the appeal at such ensuing sessions.

(p) *Rex v. the Justices of Gloucestershire, supra* 191.

(q) 9 *Geo. 1. c. 7. § 8.*

1779.
The KING
against the
JUSTICES of
YORKSHIRE.

The court said, that, by "*next Sessions*," the statute of Car. 2. must have meant the next *possible* Sessions, and that, here, it was impossible for the appellants to lodge their appeal at the *Michaelmas* Sessions.

The rule made absolute [C].

[C] But in *Rex v. the Justices of Herefordshire*, where the order was dated 18th April, the pauper removed 19th, and the Sessions held the 22d,

at the distance only of 20 miles from the place to which he was removed, the court refused a *mandamus*. 3 Term Rep. 504.

Saturday,
15th May.

The KING against MAY.

In an indictment, the words "in manner and form following, that is to say," do not bind the party to recite the instrument, &c. *verbatim*, nor render mere formal omissions or mistakes fatal.—If a clerk of the peace in drawing an indictment introduce unnecessary recitals, the court will order him to pay the expence thereby incurred.

* [194]

IN an indictment for perjury tried before BULLER, Justice, at the Sittings at *Westminster*, in last *Hilary Term* (r), the perjury was laid to have been committed by the defendant, in giving his evidence as prosecutor, upon an indictment against A. for an assault. The defendant having been found guilty, on *Wednesday* the 3d of *February* 1779, Cowper moved for a rule to shew cause, why the verdict should not be set aside, and judgment of acquittal entered upon the following ground: The original indictment, in stating the injury which the defendant (then the prosecutor) had received, said, "*whereby his life was greatly despaired of*." The present indictment, after mentioning that there had been an indictment preferred by the defendant, went on thus; "*which indictment was presented in manner and form following, that is to say*." Then the indictment was set forth in *hac verba*, but, in the passage above-mentioned, the word "*despaired*" was omitted. It was admitted not to have been necessary that the former indictment should be recited, but it was contended, that the prosecutor, by the words "*manner and form following, that is to say*," had undertaken to recite it, and that, having done so, he was bound to set it forth *verbatim*. This objection had been made at the trial, but was over-ruled by the Judge, who said, that the word, "*tenor*" had so strict and technical a meaning as to make it necessary to recite *verbatim*, but that, by the expression in this case, nothing more than a *substantial* recital was requisite, and that the variance here was only in matter of form. He mentioned a case where the variance was "*undertood*" in the recital of an *affidavit*, in an indictment, instead of "*understood*," in which, on a motion for a new trial, although the introductory words were "*tenor*" and

(r) *Thursday*, the 28th of *January*, 1779.

"and effect," the court determined, that *the variance was not fatal* [25].

A rule to shew cause was granted, but was afterwards dropped, and the defendant was, this day, called upon his recognizance, in order that judgment might be pronounced against him.

The indictment, which had been removed by *certiorari*, from the Quarter Sessions for *Middlesex*, appearing to be of an exorbitant length, stating all the continuances on the former prosecution, &c. which is rendered unnecessary by the express words of the statute of 23 Geo. 2. c. 11. § 1. the court ordered, that it should be referred to the master to see what part of the record was unnecessary, and that the clerk of the peace should pay the expence incurred by such unnecessary part [26].

1779.

The KING
against
MAY.

[25] *M. 15 G. 3. Rex v. Beech*. The distinction laid down by the court, in that case, was, that, where the misrecited word is in itself a word, though not intelligible with the context, as, "air" for "beir," there the variance, according to the decisions, is fatal, but not if the mutilated word does not make any other word [† 61]. *Qu.* therefore, as to the case of *Turvil v. Aynsworth*, (*B. R. H. 1 Geo. 2. 2 Lord Raym. 1515. 2 Str. 787.*) where, in an *assize*, the word "*Australia*" being used in stating the name of the *South Sea Company*, instead of "*Australia*," the variance was held to be fatal [67].

[26] LORD MANSFIELD desired the bar would take a note of this, that it might be publicly known.—A case, in some respects similar, occurred in this term, when I happened not to be in court, *viz. Rex v. Bury*. but I have seen a very accurate report of it. It came on upon a rule to shew cause,

why an attachment should not issue against the defendant, who was clerk of assize on the *Norfolk* circuit, for not obeying a writ of *certiorari* to remove an indictment for murder, and a special verdict founded upon it, (*Rex v. Borthwick, T. 19 Geo. 3. Infra, p. 207.*) The defendant insisted, that he had a right to retain the record till he should be paid his fees for drawing, ingrossing, &c. * which the attorney for the prisoner refused to do, on the ground of their being exorbitant. However, on the attorney's undertaking to pay as much as should, on a reference to the Master, he reported to be due, the record was returned into court, [195] upon which the rule was discharged. LORD MANSFIELD said he should be very unwilling to determine that a clerk of assize has a lien on the records of the court for his fees, for that he foresaw great inconvenience from such a doctrine.

[† 61] The case of *Rex v. Beech* has been since reported, *Corop. 229.*

[67] The introduction of an unmeaning word in the recital of any instrument, in a declaration, (as of "if" in setting forth the sheriff's precept to the returning officer, in an

action for a bribery) is not a fatal variance. *King v. Pippet, B. R. E. 26 Geo. 3. 2 Term Rep. 235. Vide Infra, Bristow v. Wright, 665.*

* *Vide Wilkins v. Carmichael, H. 19 G. 3. Supra, p. 101. 104.*

The End of EASTER TERM 19 GEORGE III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Nineteenth Year of the Reign of GEORGE III.

1779.

Saturday,
5th June.DUNCAN *against* THOMAS:

If a warrant of attorney to confess judgment has been obtained by fraud, the court will order it to be delivered up, upon motion for that purpose, although no proceedings have been had upon it.

THIS was a rule to shew cause why a bond and warrant of attorney to confess judgment *in this court*, should not be delivered up, as having been obtained by fraud, and while the party was in custody under process out of the court of *Exchequer*. Judgment had not been, in fact, entered up, nor any proceedings had, on the bond; and it was, therefore, urged, that the court could not entertain the motion, there being no instance in which it had ever extended its equitable jurisdiction so far. The rule however was made absolute; BULLER, *Justice*, observing that the court had the same jurisdiction as if the judgment had actually been entered up. If it were otherwise, he said, the consequences would be extremely inconvenient. The judgment might be entered up in the vacation, and the defendant taken in execution, before any application could be made to the court.

Lord MANSFIELD,—absent.

Howorth, for the plaintiff.—*Morris*, for the defendant.

HASLAR

1779.

Tuesday,
8th June.HASELAR *against* ANSELL.

ACTION on a bond.—*Plea*, judgment recovered.—*Replication*, *nul tiel record*; which was delivered with a rule to return the paper-book in four days. The paper-book was not offered to be returned till the morning of the fifth day, before the opening of the office, when the plaintiff refused to receive it, and immediately entered up judgment, and took out execution. Upon this, the defendant obtained a rule to shew cause, why the judgment, and subsequent proceedings, should not be set aside for irregularity.

On a rule to plead, &c. in four days, if the defendant delay till the morning of the fifth day the plaintiff may sign judgment.

Baldwin, in support of the rule, relied on the authority of the case of *Oxley v. Bridge* (a), as directly in point, to shew that, by an equitable extension of the four days, they are supposed to continue till the office open on the morning of the fifth.

Lane, on the other side, insisted, that the judgment was entered up regularly, and consistently with the rules and practice of the court, and said, that in *Oxley v. Bridge* there must have been some particular circumstances which distinguished the case from the present. Lord MANSFIELD having asked the master what the practice was, he said that, strictly, the plaintiff was entitled to sign judgment, if the paper-book was not returned on the evening of the fourth day, although it is a very common indulgence to allow him till the next morning.

Lane, on being asked by his Lordship, admitted, that the plaintiff would not have been injured by waiting till the next day, and Mr. *Baldwin* on the other hand, could not say the defendant had merits.

Lord MANSFIELD was inclined to believe that *Oxley v. Bridge* differed in circumstances from this case; and was clear that a judgment entered up agreeably to what the master had certified to be, in strictness, the practice of the court, could not be set aside for irregularity.

The rule discharged.

(a) *E. 19 Geo. 3. Supra*, p. 67.

WILLIAMS *against* FRITH.

[198]

Thursday,
10th June.

ACTION on an attorney's bill; judgment by default; and writ of enquiry executed. Rule, (on the motion of *Dunning*,) to shew cause, why the verdict should not

be After an attorney's bill has been delivered a month, and no application

has been made to have it taxed by the master, the defendant will not be permitted to question the reasonableness of the *items* before a jury.—On notice to execute a writ of enquiry at a certain hour, the party is not tied down to the exact time fixed by the notice.

1779:

WILLIAMS
against
FRITH.

be set aside for irregularity. The irregularity complained of was, that notice was given to attend the execution of the writ of enquiry between ten and twelve o'clock, that the defendant and his witnesses did not attend till twelve, and that after the hour was elapsed, and they were gone, the writ was executed. It was also sworn, as a ground on merits, that the amount given by the verdict, which was 75*l.* was 30*l.* more than was really due.

Lord MANSFIELD, — The client has a summary way of trying the reasonableness of the *items* in an attorney's bill, by a reference to the master. If he waive that method, and put the attorney to his action, I never suffer him to go into a discussion of the *items*, at the trial of the cause [† 62] [63]. In this case, it was clearly a trick of the defendant's attorney to leave the place immediately after the hour was passed. When notice is given for the execution of a writ of enquiry at a certain hour, it is never understood that the time is to be scrupulously adhered to. The sheriff may have prior business which may last beyond the hour.

The rule discharged.

[† 62] *Vide* the next case.

[63] But an attorney's bill may be taxed, after action brought, and at

any time before verdict, or judgment, unless the money has been paid. *See v. Pickering, B. R. M. 30 Geo. 3.*

Thursday,
10th June.

HOOPER against TILL and his WIFE.

The same point as the *first* in the foregoing case.

THIS was also an action on an attorney's bill, in which there had been judgment by default, and a writ of enquiry executed. On Saturday, the 5th of June, *Mingo* moved for a rule to shew cause, why the verdict should not be set aside, and the bill referred to the master to be taxed. The motion was made on an affidavit, that the sheriff would not hear evidence to impeach the reasonableness of the charges.

Lord MANSFIELD was absent.

[199]

BUTLER, *Justice*, read a note of a case, where Lord MANSFIELD, and the court, had refused to permit a bill to be referred to the master to be taxed, because it had been read in evidence at *Nisi Prius*, on a notice of set-off, in a cause where the attorney was defendant, which shewed that it had been delivered a month [† 63]; and they held that

[† 63] It seems to have been there taken for granted, that an attorney cannot set off his bill till a month after it has been delivered; but the contrary was held by the court, in *E. 23 Geo. 3.* in a case of *Martin v. Winder*. For in that case, *Law* having moved, on

the part of the defendant, who was an attorney, for a rule to shew cause, why the proceedings should not be staid till his bill should be paid, or till a month from the delivery of it should expire, that he might be enabled to set it off, the court held, that though an attorney cannot

that it was then too late to dispute the amount of the items. However, in the present case, a rule to shew cause was granted.

Sylvester now shewed cause, and mentioned the case of *Clerke v. Taylor*, as directly in point (c.)

LORD MANSFIELD, — The bill of an attorney cannot be taxed at the trial of an action brought upon it, nor after verdict. If there has been an account settled between the attorney and his client, the bill shall never afterwards be taxed as of course; particular cases may be pointed out; the client may, by affidavit, shew that the business charged was never performed, or that the charges are fraudulent; but, if the business was really done, the delay of the defendant for more than a month in objecting to the quantum is an admission that he thinks that reasonable.

The rule discharged [1].

cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to set it off; that he must not produce it, at the trial, by surprise, but that it is sufficient, in such case, to deliver it time enough for the plaintiff to have it taxed before the trial. Upon hearing this opinion of the court, *Law* withdrew his motion as unnecessary.

(c) *C. B. E. 11 G. 2. Barnes*, 4to. edit. 124.

[1] This day, another point concerning the taxation of attorney's bills was moved in court, but as I have not preserved the name of the case, I have not mentioned it in the text. The circumstances were these: *Baldwin* moved that the master might be directed to tax those articles in an attorney's bill which related to conveyancing and parliamentary business, the rest being for the management of causes in this court. Lord Mansfield said, there was no doubt but the master might tax the whole; that he recollected a case, where the fees paid to a proctor for business done in the ecclesiastical court made part of the bill, and it was determined, that as the whole bill had been referred to the master, he might tax that part of it.

Nota. If the whole bill is for conveyancing, the master cannot tax it. *B.*

R. M. 12 G. 2. Anon. Barnes 4to. edit. 41, 42.

I will add here another case still, on this subject, though I did not hear it in court, when it was moved, which was in *M. 19 G. 3.* It was the case of *Dixon v. Plant*. On the last day of that term, *Dunning* moved that *Dixon's* bill as agent in town for *Plant*, a country attorney, might be referred to the master to be taxed. *Willes*.

Ashurst, and *Buller*, Justices, [200] (Lord Mansfield having left the court before the motion was made) were inclined to think that the bill was not taxable by the Master, the act of 12 G. 2. c. 13. § 6. having enacted that 2 G. 2. c. 23. § 23. (d), for referring attorneys' bills, "should not extend to any bill due from any attorney or solicitor, to any other attorney, solicitor, or clerk in court." There is a case in *Wilson*, where a single judge of this court having made an order to refer an agent's bill, and the master not having obeyed it, the court was applied to, and held that the order was irregular; the master declaring that he had never taxed a bill for agency (e). However, at the sittings at *Guildhall*, after *M. 19 G. 3. Buller*, Justice, who that day sat for Lord Mansfield, informed the bar, that, upon enquiry, it had been found to be the practice of the

(d) Made perpetual by 30 G. 2. c. 19. § 75.

(e) *B. R. E. 23 G. 2. Anon. 1 Wilk.* 266.

1779.

HOOVER
against
Fitz.

the court of *Common Pleas*, confirmed by a case decided in that court, to make orders for the taxation of agents' bills, and he read a note of the case which had been lent him by *Gould* Justice, and was as follows :

" *Ex parte Bearcroft*, an Attorney—
" In *E. 7 Geo. 3.* *Davy*, Serjeant,
" moved that the bill of *Unwin* an at-
" torney, agent for *Bearcroft*, should
" be referred to be taxed, and said,
" though it was not within the statute
" of *2 Geo. 2.* by reason of that of *12*
" *Geo. 2.* yet that it might be taxed
" under the general jurisdiction of the
" court, and under *3 Jac. 1. c. 7.*
" He made his motion on this general
" authority, without any affidavit.
" *Nares*, Serjeant, objected, that there
" never had been an instance of such
" taxation of an agent's bill. But the
" court thought proper to grant a rule
" to shew cause.—*T. 7 Geo. 3.* *Nares*
" shewed cause, and observed that the
" statute of *12 Geo. 2.* provides, that
" *2 Geo. 2.* shall not extend, &c. and
" therefore it is not necessary for an
" agent to deliver a bill before he brings
" an action; the reason of which he
" took to be that it was not looked upon
" to be subject to taxation. The sta-
" tute of *3 Jac. 1.* requires bill to be
" delivered by attorneys to their masters
" or clients. They are supposed ig-
" norant of the steps in a cause, and
" the due charges. The agent, he
" said, who does the business in town
" is entitled to the fees, unless there is
" a contrary stipulation between him
" and the country attorney. *Davy*,
" *contra*, said that he did not apply on
" the ground of the statute of *2 Geo.*

" *2.* but on the practice of the court,
" In *3 Jac. 1.* there is no direction as
" to taxation, yet an attorney's bill was
" certainly taxable before *2 Geo. 2.*
" That *12 Geo. 2.* shews it to have been
" thought that *2 Geo. 2.* extended to
" agents' bills and properly restrained
" (as various things in it are not ap-
" plicable between attorneys and agents,
" such as words at length, &c.) leaving
" the case between them as it stood be-
" fore.—The court was of opinion that
" the bill should be taxed, and that
" they could order it under the general
" authority of the court, that it might
" be seen that only due charges were
" made.—After the court had declared
" this opinion, *Barnes*, the secondary,
" said he remembered, before *2 Geo. 2.*
" applications made to judges at their
" chambers to refer agents' bills to be
" taxed, and that it was frequently
" done upon the country attorney's
" bringing the fees charged into court.
"—The rule was made absolute, but
" with the condition that *Bearcroft*,
" should bring the money into court (a)."

Buller, Justice, then said, that, on
being made acquainted with this case,
he had conferred with *Willer*, and *Ast-
burst*, Justices, and that they were all
three of opinion, that *Dixon*'s bill should
be referred; that the practice of all the
courts ought to be uniform; that
questions on bills of this sort would be
much better understood and settled by
the master, than by a jury or judge, at
Nisi Prius. Upon this, the counsel in
the cause agreed, that the bill should
be taxed by consent, the defendant
bringing into court the sum remaining
due on the amount of the plaintiff's
claim, and that what should be deducted,
if any thing, should be afterwards re-
paid to him.

(a) Mr. Justice *Gould* was so oblig-
ing as to furnish me with a copy of

his note, from which copy the above
is printed.

WIGGLESWORTH against DALLISON and
Another.1779-
Thursday,
10th June.

THIS was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called *Hibaldstow Ley*, in the parish of *Hibaldstow*, in the county of *Lincoln*. The defendant *Dallison* pleaded *liberum tenementum*, and the other defendant justified as his servant. The plaintiff replied, that true it was that the *locus in quo* was the close, soil and freehold of *Dallison*; but,—after stating that one *Isabella Dallison* deceased, (being tenant for life,) and *Dallison*, the reversioner in fee, made a lease on the 2d of *March* 1753, by which the said *Isabella* demised, and the said *Dallison* confirmed, the said close to the plaintiff, his executors, administrators, and assigns, for 21 years, to be computed from the 1st of *May* 1755, and that the plaintiff, by virtue thereof, entered and continued in possession, till the end of the said term of 21 years,—he pleaded a custom, in the following words, *viz.* “That, within the parish of *Hibaldstow*, there now is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of *May* in any year, hath been used and accustomed, and of right ought to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped, and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant, upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years.” He then stated that, in the year 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time, lawfully possessed

A custom that tenants, whether by parole or deed, shall have the way-going crop after the expiration of their terms, is good.

1779.
WIGGLES-
WORTH
against
DALLISON.

seised of the said corn, as his absolute property, by virtue of the custom.—The defendant, in his *rejoinder*, denied the existence of any such custom, and concluded to the country.—The cause was tried before EYRE, *Baron*, at the last Assizes for *Lincolnshire*, when the jury found the custom, in the words of the replication.

Baldwin moved in arrest of judgment, that such a custom was repugnant to the terms of the deed, and, therefore, though it might be good in respect to parole leases, could not have a legal existence in the case of leases by deed. He relied on *Trumper v. Carwardine*, before YATES *Justice* (f), the circumstances of which case were these:

“The plaintiff had been lessee under the corporation of *Hereford*, for a term of 21 years, which expired on the 4th of *December*, 1767. In the lease, there was no covenant that the tenant should have his off-going crop. In the seed-time before the expiration of the term, he sowed the fallow with wheat. The succeeding tenant obstructed him in cutting the wheat, when it became ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a custom in *Herefordshire* for tenants who quit their farms at *Christmas*, or *Candlemas*, to reap the corn sown the preceding autumn. YATES, *Justice*, held that the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parole agreements. That, in the case of a lease by deed, both parties are bound by the express agreements contained in it, as that the term shall expire at such a day, &c. and therefore all implication is taken away. That if such a custom could be set up, the statute of frauds would be thereby superseded in *Herefordshire* [1]. Accordingly the plaintiff did not recover on the custom, although on another count in *traverse* in the same declaration, he had a verdict.”

A rule to shew cause was granted.

[203]

The case was argued on *Tuesday* the 8th of *June*, by *Hill*, Serjeant, *Chambre*, and *Dayrell*, for the plaintiff, and *Cass*, *Baldwin*, *Balguy*, and *Gough*, for the defendants; when three objections were made on the part of the defendant, viz. 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, (as had been contended on moving for the rule,) it was repugnant to the deed under which the plaintiff had held.

For

(f) At the summer Assizes for *Herefordshire* 1769.

[1] *Qu.* This argument seems more applicable to parole leases, because if a parole lease for three years could be

extended in some degree for half a year longer by such a custom, it might be said that this would be repugnant to the Statute of frauds.

For the plaintiff it was urged, 1. That it was not an *unreasonable* custom, because without an express agreement, or such a custom as this, there could be no crop the last year of a term, for the tenant would not sow, if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public, as much as customs for turning a plough, or drying nets, on another person's land, which had been held to be good (g). That it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one; not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of his term.

2. That it was sufficiently *certain*, by the reference to the residue of the lands not sworn, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of, for, if it had been that so many acres might be sown and reaped, that would have been incompatible with those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. *Reasonable* is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them; as with regard to customary fines paid to the lord of a manor, estovers prescribed by a party to be taken for the use of his house, &c. In the case of *Bennington v. Taylor*, reported in *Lutwyche* (h), where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall in a fair, and, on a motion in arrest of judgment, it was objected, that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide.

3. That the circumstances of the plaintiff's lease in this case having been by deed, made no difference. There was no agreement contained in the deed, that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. He did not claim under any parole contract express or implied, and therefore the argument of repugnancy did not apply; and the *Nisi Prius* case, which had been cited, went upon mistaken reasoning. *Hill*, Serjeant, admitted, that he knew of no instance in the Reports, of a similar custom to this,

1779.

WIGGLES-
WORTH
against
DALBISON.

[204]

(g) *Vide Davis* 32. b. (h) *C. B. E. or T. 12 W. 3. 2 Lutw. 1517. 1519.*

1779.
WIGGLES-
WORTH
against
DALLISON.

this, in the case of freehold property, but he said, there were several with regard to copyholds that went much farther; and he cited *Escount v. Weeks* (i), where a custom, that the executors and administrators of every customary tenant for life, if he should die between *Christmas* and *Lady-day*, should hold over till the *Michaelmas* following, is stated on the pleadings [2]; and no objection taken to it on the argument of the case.

For the defendant were cited, *Grantham v. Howley* (k) [3];—*White v. Sayer* (l), in which last case, a custom for a lord of a manor “to have common of pasture in all “the lands of his tenants for life or years,” which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, and different from a prescription to have a heriot from every lessee for life, because that is only collateral (m)—A case relied on by *Houghton*, Justice, in *White v. Sayer*, in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law; *Startup v. Dodderidge* (n), where the court refused to grant a prohibition, on the suggestion of a *modus* “to pay, upon request, at the rate of two shillings “for every pound of the improved yearly rent or value of “the land” because the yearly rent or value was variable and uncertain;—*Naylor, qui tam, v. Scott* (o), where a custom having been found by a jury, “that every house- “keeper in the parish of *Wakefield* having a child born “there, should, at the time when the mother was church- “ed, or at the usual time after her delivery when she should be “church- “ed, pay ten pence to the vicar,” the court on a motion in arrest of judgment, determined that the custom was void, being, 1. uncertain, because the usual time for women to be church- “ed was not alleged [4], 2. unreasonable, because it obliged the husband to pay if the woman was not church- “ed at all, or if she removed from the parish, or died before the time of churching;—*Carleton v. Brightwell* (p), where the defendant, on a bill for tithes, set up a *modus*, “that

(i) *T. 10 W. 3. 1 Lutw. 799. 801.*

[2] It is found by the special ver- dict, the action being *ejectment*.

(k) *T. 13 Jac. 1. Hob. 132.*

[3] That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, viz. that the question was brought on in an action of debt on a common bond conditioned for the payment of 20*l.* to the plaintiff if a certain crop of corn did of right belong to him; or, in other

words, if the question of law was in his favour.

(l) *B. R. M. 19 Jac. 1. Palm. 211.*

(m) *Cites 21 H. 7. 14.*

(n) *E. 4 Ann. 2 Ld. Raym. 1158. 2 Salk. 657. 1 Mod. 60.*

(o) *E. 2 Geo. 2. 2 Ld. Raym. 1558.*

[4] In that case the custom, as suggested, did not refer to the usage of the parish.

(p) *Canc. T. 1728. 2 P. W. 461.*

"that the inhabitants of such a tenement, with the lands usually enjoyed therewith, should pay such a sum for "tithe corn," and it was held by the Master of the Rolls, to be void for uncertainty; *Harrison v. Sharp* (g), where a *modus*, "that, when any of the inclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after *Michaelmas*, yearly," was held void, on the authority of *Startup v. Dodderidge*;—*Wilkes v. Broadbent* (r), where the court of *Common Pleas*, and afterwards, on error brought, the court of *King's Bench*, held a custom found by verdict, "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue wood there for the necessary use of the pits, and to take coals so laid, away in carts, and to burn and make into cinders coals laid there, at their pleasure," to be void, because, (among other reasons,) the word *near* was too vague and uncertain;—*Oland v. Burdwick* (s), where a feme, copyholder *durante viduitate*, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that, when the interest in land is determined by the act of the party, he shall not have the crop;—An *anonymous* case in *Moore* (t), where it was held, that a custom, "that lessor for years should hold for half year over his term," was bad;—*Roe Lessee of Bree, v. Lees* (u), where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were inclosed, and nine lay in certain open fields, a special case was reserved, which stated a custom, "that, when a tenant took a farm in which there was any open field, more or less, for an uncertain term, it was considered as a holding from three years to three years," and though the court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100 acres of land inclosed. Besides the above authorities (5), the case before YATES, Justice,

1779.

WIGGLES-
WORTH
against
DALLISON.

[206]

(g) T. 1724. *Bunb.* 174.

(r) B. R. E. 18 Geo. 2. 2 Str. 1224.

(s) B. R. H. 37 El. Cro. Eliz. 460. 5 Co. 116.

(t) H. 3 Ed. 6. *Moore* 8. pl. 27.(u) C. B. M. 18 Geo. 3. Since reported, 2 *Blackst.* 1171.[5] 4 Co. 51. b. 1 *Roll. Abr.* 563. pl. 9. & Co. *Littl.* 55. were also cited for the general principles concerning customs and emblements.

1779.

WIGGLES-
WORTH
against
DALLISON.

time, was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of the term, in a *parol* demise, may be raised by implication; as where saffron is cultivated, (in *Cambridgeshire*;) liquorice (near *Pontefract*;) or tobacco, (which formerly used to be planted in *Lincolnshire*;) but it was contended, that, in such case, a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure, in the written instrument. Such a custom as that set up, in the present case, could not, it was said, be of sufficient antiquity with respect to leases by deed, as in the time of *Richard the First*, and, long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have applied to the first of *May* old stile, and this lease was made and commenced after the alteration was introduced by 24 *Geo. 2. c. 23.* [6].

The court took time to consider; and this day, Lord MANSFIELD delivered their opinion, as follows:

[207]

Lord MANSFIELD,—We have thought of this case, and we are all of opinion, that the custom is good. It is just, for he who sows, ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease [7].

The rule discharged [8].

[6] The new style commenced the 1st of *January 1753*. But, if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part of it, as from the errors in the former method of computation, the nominal day was continually deviating, by degrees, from the natural day.

[7] *Vide Doe v. Snowden, C. B. M. 19 Geo. 3. 2 Blackst. 1225.* where it is said by the court, that if there is a taking from old *Lady-day*, (5th *April*;) the custom of most countries would en-

title the lessee to enter upon the arable at *Candlemas* (2d *Feb.*) to prepare for the *Lent* corn, without any special words for that purpose, i. e. in a written agreement for seven years; for the court were speaking of such an agreement.

[8] Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought in the *Exchequer* chamber, and the defendant assigned for errors, "That the custom contained and set forth, &c. is a

" custom

[8]
ing the
present

" custom void in law, and is contrary to, and inconsistent with, the said indenture of lease in the said replication mentioned." The case was argued at *Serjeants-Inn* before the Judges of *C. B.* and the Barons of the *Exchequer*, by *Balguy* for the plaintiff in error, and *Chambre* for the defendant. The objection to the reasonableness of the custom was abandoned. In *T. 21 G. 3.* (27th June 1781,) Lord

Loughborough delivered the unanimous opinion of the court of *Exchequer* chamber, that the custom was good; and the judgment was affirmed. *¶ Vide Lowry v Harris, Hereford Summer Assizes, 18 Geo. 3. on Skynner, Chief Baron, H. Black. 7. n. (a). Bevan v. Delahay, C. B. E. 28 Geo. 3. Ibid. 5.*

1779.

WEDGESS-
WHATH
against
DALLISON.

18 Geo. 3.
H. Black. 7.
n. (a). *Bevan v. Delahay, C. B. E.*
28 Geo. 3. *Ibid. 5.*

The KING against JOHN BORTHWICK and sixteen Others.

Saturday,
12th June,

THIS case came on upon a special verdict, found at the last *Lent Assizes*, for the county of *Suffolk*, before *ASHHURST, Justice*, on the trial of an indictment for murder. The indictment set forth, That, on the 7th of December, 19 Geo. 3. the prisoners feloniously, &c. upon one *Thomas Nichols* made an assault; That *Borthwick* [8] with a large stick, which he then held in both * his hands, struck the deceased several times, giving him thereby a mortal bruise on the head, of which he died the next day; and that the other prisoners, at the time of the felony and murder by the said *Borthwick* committed, feloniously, &c. were present, aiding, abetting &c. the said *Borthwick* the felony and murder aforesaid, in manner and form aforesaid, to commit, " and so the jurors aforesaid, &c. say that the said *John Borthwick, Edward Barry, &c.* (naming all the others,) him the said *Thomas Nichols*, in manner and form aforesaid, feloniously, &c. did kill and murder."—One of the persons indicted died before the trial. The others pleaded not guilty.—The verdict stated, That *Richard Hatton*, one of the prisoners, was a midshipman, and a non-commissioned officer belonging to a tender in the government service called the *Charlotte*, lying off *Harwich*, and employed in the said service for impressing men for the purposes of manning his Majesty's ships of war. That the others were part of the crew of the same tender, of which Lieutenant *William Palmer* was then commander, who had previously received, and then had in his custody, a warrant in writing under the hands of the commissioners for executing the office of Lord High Admiral of Great Britain, &c. and under the seal of the office of Admiralty, That the warrant was in the following words, viz.

On an indictment for murder, if the jury find a special verdict, it is necessary, in order to affect principals in the second degree, to state, either, 1. that they were actually present, or, 2. some acts done by them at the very time, which unavoidably shew that they were present, or, 3. that they were of the same party, on the same pursuit, and under the same engagements and expectation of mutual defence and support with the person who did the fact.

* [208]

" By

[8] If several are indicted, *A.* as giving the mortal blow, and the others as present aiding, &c. evidence that one of the others gave the blow, and that *A.* was only present, &c. will maintain the indictment, 1 *Hale* 437, 438.

1779.

The KING
against
BORTH-
WICK.

[209]

" By the Commissioners for executing the office of Lord
" High Admiral of *Great Britain and Ireland, &c.* and of
" all his Majesty's Plantations, &c. In pursuance of his
" Majesty's order in council, dated, &c. we do hereby
" empower and direct you to impress or cause to be im-
" pressed, so many seamen and sea-faring men, and per-
" sons whose occupations and callings are to work in ves-
" sels and boats upon rivers, as you shall be able, in order
" to man his Majesty's ships, giving unto each man, so
" impressed, one shilling for prest money, and in the exe-
" cution thereof, you are to take care that you do not
" demand or receive any money, gratuity, reward, or
" other consideration whatsoever, for the sparing any per-
" son or persons fit for his Majesty's service, or exchang-
" ing or discharging any person or persons who may be
" impressed, and also that every person acting under you does
" not demand or receive any consideration whatsoever upon
" the like account, as you will answer it at your peril.
" This warrant to continue in force till, &c. and, in the
" due execution thereof, all mayors, sheriffs, justices of
" the peace, bailiffs, constables, headboroughs, and all
" other his Majesty's officers, and subjects, whom it may
" concern, are hereby required to be aiding and assisting
" unto you and those employed by you, as they tender his
" Majesty's service, and will answer the contrary at their
" perils. Given, &c." [9].

That *Palmer*, being then the only commissioned officer on board the *Charlotte*, and having received information of certain sea-faring men being at *Ipswich*, in pursuance of the said press-warrant, gave verbal orders to *Richard Hanton*, and the other prisoners, to proceed thither, and to take such persons as they should there find liable to be impressed. That it is the constant usage and invariable custom of the navy, for all commissioned officers, having in their custody such press-warrants, to give verbal orders to such petty-officers whom they may think fit to employ on such services of impressing men for his majesty's service, the warrant remaining in their own custody; and that such petty-officers usually act without any other authority than such verbal order. That the press-warrant was not backed or signed by any magistrate. That, in consequence of, and conformity to, the verbal orders given by *Palmer*, *Hanton* and the other prisoners went to *Ipswich*, and having information, that there were certain sea-faring men at a publick-house in *Ipswich* kept by one *Wiles*, went all together in company to that house, between ten and twelve at night.

[9] It is observable, that this warrant differs, in some respects, from that printed by Mr. Justice *Foster*, particularly in omitting the power to de-

pute the execution of it to a commissioned officer, by an indorsement on the back.

Foss. Cr. Law. 156.

night. That the gate leading from the street into the yard of the house was opened by the maid servant of *Wiles*, to the prisoners. That the door being open, they entered the house. That certain sea-faring men, viz. *Sharpe*, *Bennet*, and *Osborne*, were then sitting drinking in an inner room in the house, together with *Wiles* and one *Grimwood*. That the prisoners entered that inner room with large sticks in their hands, such as are usually carried by press-gangs, and were there informed that *Bennet* and *Osborne* belonged to the *Brilliant* storeship in the service of government. That the crews of such storeships are paid by the contractors, and not by government. That no protection was produced, or offered to be produced, by *Bennet* and *Osborne*, or either of them, or demanded by the prisoners, or any of them. That the prisoners, upon entering the inner room, informed *Sharpe*, *Bennet*, *Osborne*, *Wiles*, and *Grimwood*, that they were come for the purpose of impressing men, and that *Sharpe* then drew a knife out of his pocket, and brandishing it, said, "the first man that hinders me from going home to my wife and family, I'll stick him," and, in that manner passed through the gang, and quitted the room. That *Wiles*, *Osborne*, and *Grimwood* had no weapons in their hands, but that *Bennet* drew a poker out of the fire for his defence, and said "He would not be taken alive;" and, upon this declaration of *Bennet*, some of the prisoners attempted to wrest the poker out of his hands; upon which attempt an affray immediately ensued, and the poker was, soon after, taken out of the hands of *Bennet*, but the affray continued, during which *Wiles* threw down a table then in the room, and extinguished the light of the candle, which was then burning, and several blows were given. That, during the affray, the deceased came to the door of the room, and stood in the door-way, leaning on a walking-stick, which he then had in his hand, and said to *Bennet* and *Osborne*, "My lads, do as you have done before," (meaning thereby that *Bennet* and *Osborne* should rescue themselves by force;) and that the deceased then said, to one of the prisoners, "Are not you ashamed to beat a man who is down?" (meaning *Wiles*). That during the affray, the deceased received a blow on the head from one of the prisoners, with a large wooden stick ("but from which of them the jurors are ignorant") and that the blow was the cause of his death—That, according as the court should think the killing, &c. felony and murder, or felony and manslaughter, or neither felony and murder nor felony and manslaughter, the jurors found the prisoners guilty of felony and murder, or of felony and manslaughter, or not guilty.

The

1779.

The KING
against
BORTH-
WICK.

[210]

1779.

The King
against
BORTH-
WICK.

The case was argued, on *Wednesday* the 9th of June, by Jones, for the prosecution, and Graham, for the prisoners. Lord Mansfield absent.

The counsel for the prosecution came prepared to argue the general question of the legality of pressing; but the court intimated an opinion, that it was unnecessary to agitate that point in this case, as the warrant stated could not authorize a parol delegation of the power vested in the lieutenant, and, indeed, it was admitted by the counsel for the prisoners, that they were trespassers. But, as none of them could be considered as more than principals in the second degree, the jury not having found who it was that gave the blow, it was insisted, for the prisoners, that the verdict was defective, in not stating them to have been *present, aiding and abetting*. To prove that this was essential, 1 Hale 438. was cited *Reg. v. Messenger* (v), and *Reg. v. Royce* (w).

[211]

In answer to this, it was observed, that the technical words "*present aiding and abetting*" are not necessary in a special verdict, as they are in an indictment, and that enough was found, for the court to imply, either an *actual* or a *constructive* presence. To shew that the latter was sufficient, a case in 3 *Ed. 3. Coram.* 350. and Lord Dacre's *Case*, cited in 1 Hale, 439. were relied on.

The court took time to consider; and WILLES, *Justice*, now delivered their opinion to the following effect.

WILLES, *Justice*.—In this case, the counsel for the prosecutor offered to argue the general question, whether the warrant stated in the special verdict was legal or not. But, unless the prisoners had a power to execute it, and conducted themselves legally in the execution, there is no occasion for the court to consider that question. It was admitted by the counsel for the prisoners, that they were not strictly justifiable in the execution of the warrant, and therefore were trespassers. The court were all of that opinion, on reading the verdict; for the authority given by the warrant could not be delegated by *parol* to other persons. On this ground the court stopped the counsel in the argument of the general question, and it is become unnecessary to consider the degree of guilt which might have been imputed to the prisoners, for we are all of opinion that the verdict is substantially defective. It is not expressly found that they all were *present aiding and assisting* when the blow was given, or even when the affray began. That either an *actual* or a *constructive* presence was necessary, to involve the prisoners in the homicide, was rightly admitted. But it was contended, 1. That enough is stated to warrant us implying that all the prisoners were *actually* present the whole time; 2. That an *actual* presence

(v) *Kel.* 70.(w) *E. 7 Geo. 3. 4 Burr.* 2073.

is not necessary, and that, as the prisoners all went together on one common illegal design, *that constituted a constructive* presence, and would, in law, involve all of them in the same degree of guilt. 1. As to the first point, in so penal a case as this, where the presence is of the essence of the crime, the court will not presume it. It is undoubtedly true that no technical words are necessary in a special verdict. It is not necessary to say, in words, that the prisoners were all *present*. If it were stated that they did some act *at the time*, *that* would be sufficient, because the court must then unavoidably see that they were present. In *Messinger's Case*, reported in *Kelynge*, the judges say, "where several acts of force are found to have been actually committed in pursuance of the design, there is no need to find the prisoners to have been *aiding and assisting*, for that is only necessary to be found where the jury find a person was there amongst them, and find no particular act of force done by him, but only his presence." There it is necessary to find he was present. "*aiding and assisting*" (x). *Francis's Case* (y) was much stronger than the present. That was an indictment for a highway robbery. All the prisoners were found to be in company together. *Francis* struck the money out of *Cox's* hand, and, upon his offering to take it up from the ground, they threatened to knock out his brains, whereupon he desisted; and the jury further found that the prisoners *then and there* immediately took up the money, and rode off with it, and *Cox* immediately pursued. To constitute a highway robbery, a taking *in the presence of the person robbed* is necessary; and all the judges held that, on that finding, they could not imply that the money was taken up in *Cox's* presence, and that a special verdict cannot be made good by intendment or construction. In the present case, it is not found that the prisoners did any act, during the affray, or that they were *present aiding and assisting*; and the court cannot intend that they were. 2. As to the second point, and the authorities relied on; in 3 *Ed. 3. Coron.* 350. all the prisoners were *actually present*. In *Lord Dacre's Case*, all went with a design to resist every opposition. In *Moore* (z) it is stated, that they went *under an agreement to kill all who should resist them*, and it appears, by that report of the case, as well as by what is said in *Foster* (a), that they were all acting in the same pursuit *at the time* when the murder was committed. *Foster* says, "it was sufficient that, *at the instant the fact was committed*, they were all of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those that did the fact." In the present case, as it is not found

1779:

The KING
against
BOATH-
WICK.

[212]

(x) *Kel.* 78.

(z) 86.

(y) *E. & Geo.* 2. *Str.* 1015. *Com.*

(a) 354.

1779.

The KING
against
BORTH-
WICK.

[213]

Saturday,
12th June.

A writ of
latitat runs
into *Wales*.

found that all the prisoners were of the same party, and on the same pursuit, &c. when the fact was committed, as it is not found who gave the blow, or who was present, we are all of opinion that the prisoners must be discharged.

The prisoners discharged.

PENRY against JONES.

HURST moved for a rule to shew cause, why an *exoneretur* should not be entered on the bail-piece, upon an affidavit, that the defendant had been arrested on a *latitat*, in *Brecknockshire* in *Wales*, that the cause of action was a judgment in the great sessions, and that both the parties lived within that jurisdiction. The motion was made on the authority of the cases of *Lampley v. Thomas*, and *Jones v. Jones*, reported by *Wilson* (b), where the decision is stated to have been, that a writ of *latitat* does not run into *Wales*; but *BULLER*, Justice, mentioned, that the contrary had been held, since that case, in several instances, and particularly in a case where *YATES*, Justice, had considered the question very fully, and delivered a solemn argument upon it (10). The court refused to grant the rule, and said, that if the court had not jurisdiction, the proper way for the defendant to take advantage of it would be by a plea in abatement.

(b) *B. R. H.* 21 *Geo. 2.* 1 *Wils.* 193.
206.

[10] That was the case of *Lloyd v. Jones*, *T. 9 Geo. 3.* The plaintiff declared against the defendant in *custodia Marescalli*. The defendant pleaded, that he was resident in *Montgomeryshire* in *Wales*, and denied the jurisdiction of the court. To this plea the plaintiff demurred. After the demurrer had been once argued, (when the cases in *Wilson* were insisted upon by the defendant's counsel,) *Yates*, Justice, went at large into the question, and examined the different statutes and authorities, intimating a very clear opinion in favour of the jurisdiction of the court. The cause however stood over to be ar-

gued again, but the defendant having declined further argument, judgment was given for the plaintiff, *M. 10 Geo. 3.*—The late *Welsh* act (13 *Geo. 3. c. 51.*) seems very clearly to recognize the jurisdiction of other courts, besides the *Exchequer*, (whose jurisdiction has never been denied, though founded on a legal fiction as much as that of the *King's Bench*,) to hold plea, and issue *mesne* process, against parties resident in *Wales*. The words are, "In all transitory actions which shall be brought in any of his majesty's courts of record out of *Wales*, &c. if it shall appear that the defendant was resident in *Wales* at the time of the service of any writ or other *mesne* process served on him, &c."

1779.

JONES *against* WILLIAMS and Another.Tuesday,
15th June.

ACTION on a bond.—The defendant *Williams* cravedoyer of the condition, which was, that one *Carruthers*, who had entered into the service of the plaintiff as his clerk in the distillery business, should during his continuance in that service, faithfully and diligently serve him, and in case he should at any time lose, embezzle, destroy, purloin, consume, mispend, or unlawfully make away with, any money, notes, bills, drafts, &c. that should be entrusted to him, or in any way come to his hands, custody, or possession, by, from, on account of, or belonging to the plaintiff, or any of his customers or employers, that the defendants, or either of them, should, on notice thereof given to them, or either of them, make good the loss thereby sustained.—He then pleaded, that *Carruthers*, during his continuance in the plaintiff's service, faithfully and diligently served him, and did not at any time lose, embezzle, &c.—*Replication*, that, during *Carruthers*' continuance in the plaintiff's service, to wit, on the 15th of July 1777, a large sum of money, viz. 13*l.* 14*s.* 9*d.* $\frac{1}{2}$ came to his hands, custody, and possession, on account of the plaintiff, which he, on the same day, &c. embezzled and mispent; whereof the plaintiff afterwards gave notice to the defendant.—To this replication the defendant demurred, and shewed for cause, "That it did not appear whether *Carruthers* had received the money for the plaintiff in his business of a distiller, or in what capacity he had received it: and that it was not shewn from whom he had received it."

If the condition of a bond is, that *A.* shall not embezzle any money that shall come to his hands on account of his master, it is necessary, in an action against the obligor, to state, in the breach, what particular sum of money was embezzled, and how, or from whom it was received.

Baldwin argued in support of the demurrer. 1. To shew that it ought to have been stated, that the money embezzled was received in the course of the business in which *Carruthers* was employed, he cited *Wright v. Ruffel* (c), *Lord Arlington v. Merricke* (d), *Houghton v. Day* (e), *Stibbs v. Clough* (f), and *Mills v. Astell* (g). 2. He contended, that the plaintiff should have specified more particularly what the money was which had been embezzled, and from whom it was received; for that, if issue had been taken on the replication, the defendant would not have had sufficient notice what the plaintiff went for, to prepare for his defence: That this objection was more particularly applicable in the case of a surety.

Coxper, for the plaintiff, (being told by Lord MANSFIELD to confine himself to the last point, for that the case cited

on

(c) *H. 14 Geo. 3.* 3 *Willf.* 530.(d) *E. 24 Car. 2.* 2 *Saynd.* 411.(e) *Styl.* 18.(f) *M. 6 Geo. 1.* 1 *Str.* 227.(g) 16 *Jac. 1.* *Cro. Jac.* 486.

1779.

JONES
against
WILLIAMS.

on the other did not apply, and that there was nothing in the objection,) insisted, that the replication was a full answer to the plea. That, in such a retail business as that of a distiller, the money was received in very small sums at different times, and it could not be necessary, if the 13^l. had been received at thirty different times, that each fraction should be assigned as a different breach, and issues taken on each. That perhaps the money embezzled had been taken out of the till, and it could not be known of whom in particular it was received; or, on an account between the *plaintiff* and *Carruthers*, the latter might have admitted the embezzlement.

LORD MANSFIELD,—The breach must be particularly assigned. If the money was taken out of the till, that should have been alleged.

Cowper moved, and had leave to amend, on payment of costs.

Tuesday,
15th June.FISHER *against* BRISTOW and Others.

An action for a malicious prosecution cannot be maintained till the prosecution is terminated, which must appear upon the declaration.

ACTION for a malicious presentment, (for incest,) in the ecclesiastical court of the archdeaconry of *Huntingdon*. *Demurrer* to the declaration, and cause assigned, that it was not stated, how the prosecution was disposed of, or that it was not still depending. The court were clearly of opinion, that the objection was fatal, and said it was settled, that the plaintiff in such an action, must shew the original suit, wherever instituted, to be at an end; otherwise he might recover in the action, and yet be afterwards convicted on the original prosecution.

Judgment for the defendants [K].

[K] *Vide Morgan v. Hughes, B. R. H.* Peace on malicious accusations, or of 28 *Geo. 3. 2 Term Rep. 225. S. P.* in malicious holding to bail. the cases of commitments by Justices of

[216]

Tuesday,
15th June.ABBOT and Another, Assignees of FARR, a Bankrupt, *against* PLUMBE.

In an action on a bond, or to prove a petitioning creditor's debt which arises by bond, proof of the acknowledgment of the obligor does not supersede the necessity of calling the subscribing witnesses.

THIS was an action of *trover*, by the assignees of a bankrupt, tried before LORD MANSFIELD, at *Westminster*. At the trial, to prove the petitioning creditor's debt, a witness was called, who swore, that the bankrupt had acknowledged to him, that he owed the debt upon which the commission had been sued out. On being asked how the debt arose, the witness said, by bond; and the bond was

was then produced. The subscribing witness was an attorney, who lived in *Somersetshire*. He was not called, nor was there any proof that he had been required to attend, or that he could not have been procured. A verdict was found for the plaintiffs; but Lord MANSFIELD saved the question on the sufficiency of the evidence; and *Bearcroft*, on *Tuesday* the 8th of *June*, obtained a rule to shew cause, why a nonsuit should not be entered.

Dunning, and *Davenport*, now shewed cause.—They contended, that, even if this had been an action on the bond, the admission of the defendant would have been the best evidence, and would have superseded the necessity of calling the subscribing witness.

Lord MANSFIELD,—To be sure this is a captious objection; but it is a technical rule, that the subscribing witness must be produced, and it cannot be dispensed with, unless it appear that his attendance could not be procured. It was doubted, formerly, whether if the subscribing witness denies the deed, you can call other witnesses to prove it; but it was determined by Sir *Joseph Jekyl*, in a cause which came before him at *Chester*, that, in such case, other witnesses may be examined; and it has often been done since.

ASHHURST, *Justice*.—If the evidence of the subscribing witness were to be dispensed with by this confession of the bankrupt, the defendant would be deprived of the benefit of cross examining him, concerning the time of the execution of the bond, which might be material.

BULLER, *Justice*.—It is an established rule that assignees must prove the petitioning creditor's debt by the same evidence which must have been produced in an action against the bankrupt; and it is necessary, to recover on a bond, to call the subscribing witness, unless some reason can be shewn for his absence.

The rule made absolute.

1779.

ABBOT
against
PLUMBE.

[217]

MACPHERSON against RORISON.

Wednesday,
16th June.

COWPER opposed the justification of bail for the defendant, who was in custody, on the ground, that he had given eight notices to justify, and four of them in this term, by four different attorneys, and without having obtained the leave of the court to change his attorney. The Master certified, that, by the established practice, a party cannot change his attorney without the leave of the court; upon which the bail were not permitted to justify [1]. Cowper also insisted, that the plaintiff should be allowed

A party in a cause cannot change his attorney without the leave of the court. —If notice to justify bail has been given by a new attorney not allowed by the court, the

bail will not be permitted to justify.

[1] *Vide S. P. in C. B. Kaye v. De Mattos, M. 20 Geo. 3. 2 Blackst. 1323.*

1779.
 MACPHER-
 SON
 against
 RORISON.

the costs he had been put to, by inquiring after so many bail, and attending to oppose them; and mentioned that it was the rule in the court of *Common Pleas* to allow costs in such cases. This, however, was refused, as it did not appear that this court had ever given costs in such a case.

Thursday,
 17th June.

GILBY against LOCKYER.

Two or more
 defendants
 in different
 actions can-
 not be held
 to bail upon
 one affidavit.

[218]

ON a motion, by *Cooten*, for a rule to shew cause, why the proceedings in this case should not be set aside, for irregularity, it appeared, that the defendant and two other persons had been held to bail, in separate actions, upon one affidavit. The defendant was named *second* in the affidavit. When cause was shewn, on *Tuesday* the 15th of *June*, the Master certified, that it had been settled, that several defendants in different actions, cannot be put into the same affidavit; and *ASHHURST*, *Justice*, mentioned a case, where several persons having been admitted to the freedom of a corporation upon one stamp, the admission of the person *first* named was held to be good, and that of all the others void. Upon this the court made the rule absolute; but *Dunning* having suggested, next day, that the Master had mistaken the practice, that, both in this court, and in the *Common Pleas*, it was usual to put more than one defendant into the same affidavit, and that, in a case which came before this court, where no less than eight had been inserted in one affidavit, the court had held it to be good against all, Lord MANSFIELD desired the matter might stand over for further consideration.

This day his Lordship delivered the opinion of the court, as follows:

Lord MANSFIELD,—The Judges of the court of *Common Pleas*, and the Barons of the Exchequer, have been consulted, and they all agree, that they never knew of its being the practice in their courts, that more than one defendant should be inserted in the same affidavit. If, in fact, such a practice has prevailed, it has been without their sanction or knowledge. They all disapprove of it, and consider it as contrary to the meaning of the act of parliament (*b*), and a fraud upon the stamp-duties. Let the judgment stand as at first pronounced.

The rule made absolute [† 64].

(*b*) 12 Geo. 1. c. 29. amended by 5 Geo. 2. c. 27. and made perpetual by 21 Geo. 2. c. 23.

[† 64] *Vide Crooke v. Davis*, B. R. M. 11 Geo. 3. 5 Burr. 2690. where, the defendant having been held to bail in an action of debt upon a bond, and also

in another of *assumpsit*, upon one affidavit, the court, (in the absence of Lord Mansfield,) discharged him upon common bail, in both actions. *S. P.* *Southcote v. Brathwaite*, B. R. M. 26 Geo. 3.

1779.

CORT *against* BIRKBECK.

THIS was an action on the case.—The declaration contained fourteen counts.—The first stated, That the plaintiff was possessed of certain water corn-mills, within the manor of *Settle*, in *Yorkshire*, and, by reason thereof, was entitled to the toll and multure of all corn, grain, and malt, ground at those mills; That, during all the time of his possession [11], all the tenants, inhabitants, and resiants, within the manor, “ought to have ground, and still ought to grind, all their corn, grain, and malt, which by them or any of them had been or should be used or spent ground within the manor, at the plaintiff’s mills, and not elsewhere, and to have paid and yielded, and to pay and yield * to the plaintiff for the grinding thereof *certain reasonable toll* and multure [and ought not to have used or spent, nor to use or spend within the manor any corn, grain, or malt ground which had been or should be ground elsewhere than at the plaintiff’s mills]; That the defendant was a tenant, inhabitant, and resiant, within the manor, and that he contriving, &c. to injure and prejudice the plaintiff, and deprive him of the profits and advantage of his mills, and of the toll and multure which would have accrued to him, &c. did knowingly, &c. use and spend ground within the said manor, divers large quantities of corn, grain, and malt, of the defendant, which had been ground elsewhere than at the plaintiff’s mills, and which the defendant, at the times of using and spending thereof, knew to have been ground elsewhere; by means whereof the plaintiff had been greatly injured in the profit of his mills, and had wholly lost and been deprived of the toll and multure which would have arisen, and become payable to him for the grinding of the said corn, grain, and malt, if the same had been ground at his mills.”—The fifth count was the same with the first, except that the negative words, printed above in a parenthesis, were omitted.—The defendant pleaded the general issue; and, the cause coming on to be tried at the last summer Assizes for *Yorkshire*, the plaintiff, to prove the custom, produced, besides several witnesses; 1. The proceedings in a suit in the Exchequer, *M. 5 Geo. 1.* wherein the then occupier of the mills was plaintiff, and some of the

A custom “that all the inhabitants of a manor shall grind all their corn, grain, and malt which by them or any of them shall be used or spent ground within the manor at a certain mill,” is good.—On a demurrer to evidence, the party cannot take advantage of any objection to the pleadings.

* [219]

[11] It was determined, in the case of *Chapman v. Flexman*, (cited *infra*, p. 221.) that it is not necessary in the declaration in this action to say that the inhabitants had and ought immemo-

rially, &c. and in *Coryton v. Littlebye*, (also cited *infra*, p. 221.) that it is not necessary to say the mills to be ancient mills.

1779.

CORT
against
BIRKBECK.

[220]

the tenants and residents in the manor defendants, and in which an issue was directed to try, "*whether by virtue of an ancient and immemorial tenure, custom, or usage, all and every the tenants, inhabitants, and residents, of and in the manor of Settle had been, and were tied and bound, and of right had used, and ought to grind all their and every of their corn, grain, and malt, which by them, or any of them had been or should be used or spent ground within the manor, at the said corn mills, and not elsewhere, and to pay to the owner or occupier of the said mills for grinding the said corn, grain, and malt, such toll and mulcture as had been accustomedly paid or yielded;*" 2. The record of the verdict, *H. 8. G. 1.* (whereby the jury found the custom in the words of the issue); 3. A decree of the court of Exchequer, of 28th January 1722, established and confirming the custom; 4. The proceedings in 1756, and 1757, on a *scire facias* to revive the decree against some of the then inhabitants.—To shew the breach, one *Armistead*, the plaintiff's miller, proved an acknowledgment by the defendant, "*that he had used American flour.*" He also proved, that, though the defendant was in very substantial circumstances, he had only ground one load of malt at the plaintiff's mills from October 1773, to July 1774, and only one load of wheat during four years; and another witness proved, that the defendant brewed about four or five times in the year, (but that he had seen the plaintiff's miller bring him malt, and no body else;) that he had known the defendant have fine flour in casks, which he believed might be *American flour*, as none had been brought from the neighbourhood. Several of the witnesses said, on their cross examination, that oat-meal was much more used by the common people in the manor of *Settle*, than flour, that about 40 years ago they used nothing else but oat-meal, and that there is a weekly market where oat-meal, not ground at *Settle* mills, is constantly brought, and sold to the inhabitants.

The defendant demurred to the evidence, and the case came on for argument, in *Hilary Term*, 19 *Geo. 3.* (*Tuesday the 2d of February 1779*).

Wood, for the plaintiff,—*Chambre*, for the defendant.

For the defendant, it was contended; 1. That the custom was not proved; 2. That it was void; 3. That the breach by the defendant was not proved. 1. It was said, on the first head, that the negative part of the custom was not part of the issue in the cause in the *Exchequer*, nor established by the decree, nor by the parol evidence. 2. That if the custom, as laid, extended to a prohibition from using any corn, or malt, which had come into the possession of the inhabitants already ground, as flour, meal, &c. it was so unreasonable a restraint on the liberty of the subject, as could

could not be supported in law, for that it would prevent them from using flour, &c. not made at the plaintiff's mills, even if they received it as a present, or in charity. That formerly the method of trying questions of this sort, was by the writ *de seſſa ad molendinum*, in the place of which, actions on the case had been substituted in modern times; but that, in all the precedents of either sort, there was no instance of such a custom. That, in *Fitzherbert's Natura Brevium* (i) it is laid down, that the suit *de seſſa ad molendinum* only lies, where the party withdraws his suit from the mill where he ought to grind, and goes to another; and, in all the declarations in actions on the case, it is stated, that the defendant did not grind at the plaintiff's mill, which implies that he had corn in a grindable state. That all of them, except one in *Brownlow* (k), go on to state, that he had actually ground at another mill; *Harbyn v. Greene* (l), *Coryton v. Lythebye* (m), *Chapman v. Flexman* (n). That, in the case of *Harbyn v. Greene*, a custom "for inhabitants to grind all their grain whatsoever by them spent or sold," at the plaintiff's mills, was held to be void. 3. That, if the meaning of the custom, as laid, was, that the corn which the inhabitants were possessed of in a grindable state, should, if used ground, be ground at the plaintiff's mills, then no breach was proved, the only evidence being that the defendant had used *American* flour. That buying corn already reduced to flour might, under particular circumstances, amount to an evasion of such a custom, but that the declaration should have been differently framed if the plaintiff had meant to go upon an evasion, which was an injury of a different sort from a direct breach. That the grievance stated by the plaintiff was the loss of the toll for the corn used by the defendant; but that he never would have been entitled to any toll for the flour proved to have been used. That it did not appear from the evidence, how the *American* flour had been used. That it might have been bought and resold by the defendant, which would have been neither a breach nor evasion of the custom. That there was no evidence at all of the use of oatmeal, nor any even of malt, not ground at the plaintiff's mills.

Wood, for the plaintiff, insisted, that the custom, exactly as laid in the *fifth* count, was proved by the verdict and decree in the court of *Exchequer*; for the negative words were not in that count. That, however, the want of them in the evidence, made no substantial variance on the *first* count, as they only contained matter of necessary inference. That, as to the evidence of the breach, it was not

1779.

COURT
against
DIRECKT.

[221]

(i) P. 123. or in *Ed.* 1755. p. 28.(k) *Brownl. Ent.* 63, 64.(l) T. 14 Jac. 1. *Hob.* 189.(m) E. 22 Car. 2. 2 *Saund.* 112.(n) *Cam. Seacc. M.* 1. W. & M.2 *Ventr.* 288.

1779.

Court
against
BARKBECK.
[222]

not necessary for the plaintiff to shew it with respect to every kind of grain. That in the case of *Harbyn v. Green*, the custom was held to be ill on the ground of its extending to a prohibition of the use of corn not ground at all [12]. He said he rested the case on the first and fifth counts; and read a note of the case of the *Manchester Mills* in the Duchy Court, 21 May 1757, before Lord MANSFIELD, and *Clive*, Justice, assisting the Chancellor [13], as being exactly in point.

ASHBURST, and BULLER, *Justices*, having signified their opinion, that it was not competent to the defendant to call in question the validity of the custom, on a demurrer to evidence, the *Solicitor General*, and Dunning, spoke to that point. The latter contended, that, in whatever part of a cause a party demurs, the proceedings are stopt, and the case brought before the court in such a manner, as that they are to say, whether, upon the whole record, the plaintiff is entitled to recover. That the defendant could not have taken advantage of the illegality in the custom which he now relied upon, by demurring to the declaration, because he admitted, that, in some of the counts, a legal custom was laid, and only contended, that in those to which the evidence was pointed, the custom laid was illegal. That if he could not make the objection now, he would be entirely precluded, in this court, if the evidence should be thought sufficient to maintain the issue, because, in that case, judgment would be instantly pronounced without leaving four days to move in arrest of judgment, which the defendant would have had, if the question had gone to the jury. To this the *Solicitor General* answered; 1. That they might have demurred to the bad counts separately; 2. That the judgment pronounced on this occasion would be only interlocutory, after which a writ of inquiry must issue, to settle the damages, and

[12] The same objection was taken by *Twisden*, Justice, to the custom in *Coryton v. Lithby*.

[13] That was an application to *revive*, by *scire facias*, a decree of 4 *Jac.* 1. against the defendants. The decree had established a custom that all the inhabitants of *Manchester* should send their corn which was to be spent in their houses to be ground at the plaintiff's mills. The defendants had bought bread made of flour, which the bakers had brought from some place in the neighbourhood, and which had not been ground at the plaintiff's mills. Lord *Mansfield*, in a solemn argument which

he delivered on the occasion, laid it down; 1. That the decree establishing the custom, and which had been confirmed by others, both of a prior and subsequent date, ought not to be controverted, nor the existence of the custom litigated any further before a jury; 2. That such a decree binds all persons under the same description with the original defendants; but, 3. That it is only in the case of a *direct* breach that such a decree can be revived by *scire facias*, and, if it is *evaded*, the method of proceeding is by a supplemental bill,

and then, before final judgment, they would have the four days, as in other cases [14].

*ASHMURST, *Justice*, observed, that if the court were to allow the demurrer to the evidence upon objections to the declaration, it would seem to posterity, by the record, that the court had determined that there was no evidence to be left to the jury.

The court took time to consider, and this day, Lord MANSFIELD delivered their opinion, as follows.

Lord MANSFIELD,—This is an action on the case, in which the plaintiff states, precisely, and specially, his ground of action, which is, (as stated in the first and fifth counts,) that he is possessed of certain mills at *Settle*, and that no tenant, inhabitant, and resident within the manor, can spend or use corn ground, which has not been ground at the plaintiff's mills. The breach assigned is, that the defendant used ground within the manor, several quantities of corn, &c. which the defendant well knew to have been ground elsewhere than at the plaintiff's mills. To this the defendant has pleaded not guilty. The issue is—on the custom,—the defendant's being subject to it,—and the breach. The plaintiff must prove all the three points. The defendant does enough if he disprove any of them. The parties go to trial by the authority of the court, to inquire into the truth of these facts. That is not like an ejectment, or an action for money had and received, where conclusions only are stated in the declaration, and the premises appear in evidence. Everything to be proved is here set forth, and they have nothing to do at the trial with the question, whether the facts, as alleged in the declaration, are or are not sufficient to entitle the plaintiff to recover. If that had been intended to be disputed, it might have been done *in limine*, by a demurrer to the declaration. As to the evidence, it seems to me, that the custom established by the decree in the court of *Exchequer* is the same, in substance, with that on which this action is brought. It is admitted on the record that the mills are the same, and that the defendant is resident in the manor.—(His Lordship then stated all the material part of the evidence).—To this evidence the defendant has demurred, and the only question is, whether, if the jury believe the evidence, it is competent to maintain the issue. As to that question, there is no doubt but the proceedings in the *Exchequer*, are evidence to prove the custom, and that the parol testimony of *Armistead* is evidence to shew that the defendant used flour not ground at

1779.

Court
against

BIRNBOURN.

*[223]

[14] If the jury had assented the damages conditionally at the trial, as they might, and as was done in *Scolastica's Case*, *Plowd.* 410. 2^d, if the

interlocutory and final judgments would have been pronounced *uno flatu*, or an interval of four days left between them,

1779.

Court
against
Birkbeck.
*[224]

at the plaintiff's mills. The demurrer seems to be founded on a mistake concerning the nature of this proceeding. It was argued as if it had been a demurrer to the * declaration, or a motion in arrest of judgment, on the objection that the custom could not be supported in law beyond the case of corn in a grindable state, and could not extend to flour imported or given to inhabitants, and ground before it came to their possession. But *that* is not now before the court; nor was it under the cognizance of the jury. Nothing can be stronger to shew this, than the judgment which we must give, viz. "*That the evidence was sufficient to maintain the issue.*" This will not be final. The consequence will be the same as if a verdict had been given for the plaintiff. But there is one defect which would not have been, if there had been a verdict, namely that no damages have been assessed, and therefore there must be a writ of inquiry. After that, the defendant may take advantage of any objection to the declaration, by moving in arrest of judgment, or bringing a writ of error. We are all of opinion that the evidence was sufficient.

A writ of inquiry having afterwards been executed, and damages taken only of the *fifth* count, *Chambre*, in *Easter Term*, 19 G. 3. (*Saturday*, the 24th of *April*.) obtained a rule to shew cause, why the judgment should not be arrested, and that rule came on to be argued in this present term, (*Thursday*, the 10th of *June*.) by the *Solicitor General*, *Lee*, and *Wood*, for the plaintiff, and *Dunning*, *Davenport*, and *Chambre*, for the defendant.

For the defendant, the former objections to the validity of the custom, in the extent contended for by the plaintiff, were repeated; and it was also urged, that the words in which the custom was stated, meant only, that all the corn which the inhabitants, &c. should buse ground, and which should be ground within the manor, must be ground at the plaintiff's mills. That they would fairly admit of that construction; and, if that was their meaning, the defendant could not be charged with a *direct breach*; and no fraudulent evasion was laid, for the formal words "*fraudulently, &c.*" were not a sufficient allegation of an evasion. A great deal was also said on the effect of the evidence, and on the consequence of a judgment overruling a demurrer to evidence; but what was urged on those heads was contrary to the explanation solemnly given by the court of the effect of such demurrer, in the case of *Cocksedge v. Fanshawe* (o).

The

(o) *Supra*, E. 19 Geo. 3. p. 119. 131 to 134. The argument and decision on the demurrer in this case were prior to those in *Cocksedge v. Fanshawe*, but the ultimate determination of the

present case was posterior; and I have, as in other instances, thrown together the account of all the proceedings in court upon it.

The court took time to consider, and now Lord MANSFIELD delivered their opinion, to the following effect.

Lord MANSFIELD.—When we heard this argued, a doubt arose on the extent of the custom, whether it goes only to corn growing in the manor, and ground there, or to all ground corn wherever it may grow, which is consumed within the manor. But it appears from the answers in the suit in the *Exchequer*, (which his Lordship read,) that the defendants then insisted on the restrained sense, and that they were not bound to grind corn which grew out of the manor at *Settle* mills; and the decree established the custom to the extent now insisted upon, and proves it to be reasonable.

1779.
COURT
against
BIRKENHEAD.

The rule discharged,

The KING *against* the Inhabitants of St. JOHN'S, SOUTHWARK.

BY an order of two Justices, the pauper, (who was the widow of one *Daniel Turner*,) and her three children, were removed from *Mitcham* to *St. John's, Southwark*, and on an appeal, the order was confirmed by the court of Quarter Sessions, subject to the opinion of this court, on the following facts. "The name of the husband was inserted in the land-tax rate within the parish of *Mitcham*, in the following manner:

A person who has actually paid, but was not rated to the land-tax, does not gain a settlement.

Rent.	Landlords rated.	For what	In whose occupation.	Sums assessed.
£. 5 0 0	<i>Oxtoby.</i>	House.	<i>Daniel Turner.</i>	s. d. 0 10 10

"The pauper's husband occupied the house of which he is described as occupier, and paid the rate for several years. The rate throughout was in the same form.
"The land-tax, by agreement with the landlord, was deducted from the rent."

The

1779.

The KING
against
St. JOHN'S

The case came on to be argued this day, when the court confirmed the order of sessions, on the authority of *Rex v. Carshalton* (p).

Rous, in support of the order.—*Mingay* on the other side [† 65].

(p) *E. 15 Geo. 3. Burr. Sett. Ca. No. 252.*

[† 65] The following case has been since determined.

The KING v. the INHABITANTS of MITCHAM, *B. R. E. 23 Geo. 3.*

John Heard, his wife, and children, were removed by an order of two Justices, from *Mitcham* to *Moredon*. On an appeal, the order was quashed, and a special case made, which set forth, that *Heard* inhabited for several years, a house at *Moredon*, which he

rented of a *Mr. Giffon*, (also an inhabitant of *Moredon*.) at the yearly rent of 5*l.* clear of all taxes, parliamentary and parochial. That, while he so held and occupied the house, an assessment was made on the parish of *Moredon*, for the land-tax, the title of which was as follows: "SURREY, &c. an assessment on the inhabitants of the parish of *Moredon*, for raising a sum by a land-tax for the service of the year 177—." That the following was the form of the assessment, as far as it respected the pauper.

Rent.	Landlords names.	Tenants names.	
£ 5.	Mr. Giffon.	John Heard,	s. d. 0 9 9½

That *Heard* paid the said *qr. 9½d.* to the collector, who demanded the same.

Mingay, in support of the order of sessions, contended, that the land-tax is a landlord's tax. The agreement, by which the tenant was to pay all taxes, makes no difference, for a private agreement cannot affect the parish. The payment by the tenant is a payment by the landlord. The rate is made on *inhabitants*. The case states, that the landlord was an inhabitant. His name could be inserted for no other purpose but to rate him. The reason for inserting the tenant's name is to direct the collector, for, though the tax is imposed on the landlord, it is to be collected from the tenant. He cited *Rex v. Carshalton*.

Palmer, on the other side, insisted, that this case was very distinguishable

from *Rex v. Carshalton*. There, the rate was on inhabitants and landlords, and the titles of the columns, being formed into a sentence, signified, that the landlord was rated for a tenement in the occupation of the tenant. The court decided against the settlement, in that case, with great regret. Here nobody is expressly rated. The title states the assessment to be on *inhabitants*. As to the inhabitancy of the landlord, that is merely accidental, and it cannot be supposed that all the landlords in the rate are inhabitants. It is not true, that the land-tax is properly a rate on the landlord. A rate is no more than a designation of the person, who is the object of the authority of the assessors, and is to be called upon for the payment. The intention is, not to rate the persons who are eventually liable, but the visible holder of the

the land. This is evident from the words of the land-tax act, viz. "Persons having or holding any such manors, &c." (a). The grantee of a rent-charge is liable to the tax, but is never nominally rated; nor called upon. There may be twenty people interested in different ways, in the same land. Every clause in the act favours the construction, that the tenant is the person meant to be rated. By

§ 15. the tenant is liable to [227] be distrained upon, and to be committed for want of distress. By § 16. a jurisdiction is given to the commissioners, to settle disputes between landlords and tenants, the preceding clause having empowered the tenant to deduct out of the rent, so much of the tax as the landlord ought to pay. Therefore, he does not, necessarily, pay all. How much he ought to pay depends on the private agreement between him and his tenant, which the commissioners have power to inquire into, though the assessors have not. In the present case, the landlord was to bear no part of the tax. By § 62. which imposed a double tax on Papists, the landlords only were made liable, and the tenants discharged by express words. The principal reason for inserting the landlord's name in the rate, seems to be, to afford evidence of his right to vote for knights of the shire; and for that purpose only, not with any view to the assessment or collection of the tax; a form is established by 20 Geo. 3. c. 17. for land-tax assessments, in which there is an express column for landlords.

Lord MANSFIELD,—The question is, whether the landlord, or the tenant, is the person charged. The assessment has no words to shew which of them charged. We must gather it, therefore, from other circumstances. In the first place, who ought to be charged? Certainly the occupier. The landlord is not known. The land itself, in the hands of the occupier, is the debtor to

the public. What does the assessment profess to do? To rate the inhabitants; that is the occupiers. Of whom does the collector demand the rate, and who pays it? The occupier. The circumstances supply what is omitted in the rate itself.

Willers, Justice,—This rate is on the inhabitants only, and not like that in *Rex v. Carshalton*.

Buller, Justice,—In *Rex v. Carshalton*, the court went upon the word "rated," in the landlord's column. The doubt, here, has arisen from the common phrase, that the land-tax is a landlord's tax. But as to that, Mr. Palmer's observations are unanswerable. It is not a landlord's tax with respect to the public, though it is, as between landlord and tenant. Besides, the title alone, in this case, is decisive. It is equivalent to saying, that the tenant was rated.

The order of Sessions quashed, and the original order confirmed.

Vide, also, *Rex v. the Inhabitants of the townships of Endon, Longdon, and Stanley*, M. 24 Geo. 3. and *Rex v. the Inhabitants of St. Lawrence*, M. 25 Geo. 3. where the doctrine in the above case of *Rex v. Mitcham* was confirmed. But, in *Rex v. the Inhabitants of St. James's, Bury St. Edmunds*, M. 25 Geo. 3. where there was a column of proprietors, and another of occupiers, in the assessment, and it was not specified which was rated, and, the collector having demanded the land-tax of the tenant, he paid it, but took a receipt in which the sum paid was described to be "so much assessed on the landlord;" the court held, that the tenant did not gain a settlement. *Rex v. the Inhabitants of Folskone*, M. 30 Geo. 3. 3 Term Rep. 505.

1779.

THE KING
against
ST. JOHN'S.

(a) 4 Geo. 3. c. 2. § 4.

1779-

Saturday,
19th June.BOATS *against* EDWARDS.

A defendant is not entitled to *oyer* of the original, and, if he prays *oyer*, the plaintiff may proceed without taking any notice of it.

ON a rule to shew cause, why the interlocutory judgment, which had been signed for the plaintiff, should not be set aside for irregularity, it appeared, that the defendant had *craved oyer* of the original, which the plaintiff had taken no notice of, but had signed judgment for want of a plea.

Lord MANSFIELD desired the bar to take notice, that the practice, for defendants to pray *oyer* of the original, which is so much used for delay, is not warranted by any rule or principle of justice. That it is incumbent on the court to make their proceedings as little dilatory, oppressive, and expensive, as possible. That it is unnecessary for the defendant to see the original, after he has been informed of the cause of action by the declaration. That the court of *Common Pleas* has rejected the practice (a); and that, from henceforth, plaintiffs in this court may proceed, as if such demand of *oyer* had not been made.

Dunning, and *Cowper*, for the plaintiff.—The *Solicitor General* for the defendant.

The rule discharged [+ 66].

(a) *Vide Ford v. Burnham*, C. B. T. [+ 66] *Vide Durrant v. Surend*, 11 & 12 Geo. 2. *Barnes* 4to. edit. B. R. E. 24 Geo. 3. & *Durrant v. Lawrence*, B. R. M. 25 Geo. 3.

340.

Monday,
21st June.ROBSON *against* CALZE.

If some of bankrupt's creditors are induced by money to sign his certificate, though he does not know of it at the time of the signing, nor even when he makes the necessary affidavit in order to obtain the allowance of the certificate by the Chancellor, yet, if he knows it before the actual allowance, the certificate is void.

THE defendant had applied to the court, to be discharged out of custody, on filing common bail, upon an affidavit, that he became a bankrupt after the debt was contracted, and had obtained his certificate. This motion was opposed, on the ground of his having concealed part of his effects, and that the certificate was obtained by fraud. The court, not choosing to determine upon affidavits, direct a feigned issue, to try, "whether the certificate was obtained unfairly and by fraud (q)." This issue was tried at the Sittings for *Middlesex*, before Lord MANSFIELD, in this term, when a verdict was found for the plaintiff, and the case was this day argued upon a rule to shew cause, why there should not be a new trial.

Bearcroft, for the plaintiff.—The *Solicitor General*, *Dunning*, and *Dayrell*, for the defendant.

(q) 5 Geo. 2. c. 30. § 7.

It appeared from Lord MANSFIELD's report, that, when the counsel for the plaintiff had offered to call witnesses, to prove that the defendant had concealed effects to the value of 10*l.* (r), this was objected to, as not within the terms of the issue; but his Lordship thought it was, and, at any rate, said he would not turn the plaintiff round, but, if the jury should find the concealment, would order *that* to be indorsed on the *Possea*. There was, however, no such special indorsement, so that the verdict was found on the ground of fraud in obtaining the certificate; on which head the proof was, that notes for money had been given by a confidential friend of the defendant, who had managed all his affairs, to two of the creditors, who were thereby induced to sign the certificate; that the defendant did not know of this, *at the time when he made the affidavit* directed by statute 5 Geo. 2. c. 30. § 10. by which he swore, that, "the certificate and consent of the creditors thereunto was obtained fairly and without fraud;" that this affidavit was made on the 4th of September, but was not laid before the Chancellor with the certificate, *for the allowance*, till November, and that, *before that time*, the defendant had been informed of the notes having been given, and for what purpose.

1779.

ROBSON
against
CALZE.

[229]

For the defendant, in support of the rule for a new trial, it was contended; 1. That a certificate is not void, although some of those who signed may have received money to induce them to it, provided the bankrupt himself was not privy to the giving of the money; 2. That the words "*obtained by fraud*," in the act of parliament, apply to the *signing* by the creditors, not to the *allowance* by the Chancellor.

Lord MANSFIELD,—I am clearly of opinion, that the words of the issue took in the whole question, and were so intended by the court; for, where there is a concealment, the certificate is not fairly obtained. The question now is, Whether the certificate obtained by means of notes given to some of the creditors is fair, and such as the defendant may avail himself of? If there were creditors enough who would sign the certificate, and an enemy of the bankrupt were to give money to one of the creditors to induce him to sign, for the mere purpose of preventing the bankrupt from receiving any benefit from the certificate, this would be a fraud on the bankrupt, and should not hurt him. But the reasoning on the part of the defendant arises from not attending to a distinction, *viz.* that although a third person shall not be *punished* for the fraud of another, he shall not *avail* himself of it. There is no case in the law where that can be done. In the case of *simony*, the presentation is void, though the money has been

1779.

ROBSON
against
CALZE.

[230]

been given without the privity of the presentee. In like manner all securities obtained by fraud are void. There is no way of compelling the creditors to sign the certificate. They are all left at liberty, and ought to be upon a *par*; and if some are induced to sign it, because others have, whom they suppose to be upon a *par* with themselves, but who, in fact, have been paid, this is a gross fraud upon them. So the matter would stand if there had been no privity in the bankrupt; but there is strong evidence that he knew of the notes being given before the allowance of the certificate, which, in my opinion, is not complete till it is allowed. If the fact had come to the knowledge of any of the creditors, and had been stated by them to the Chancellor, before the allowance of the certificate, he could not have allowed it. However, I put the case on the broad ground that a certificate is void, if obtained by fraud, though without the knowledge of the bankrupt.

WILLES, *Justice*.—Perhaps it may be difficult to lay down a general rule, how far the certificate of a bankrupt may be affected by the act of a friend; and therefore I shall give no opinion on the first point, although I am inclined to think, that, in this case, the certificate would have been void, if the defendant had not known of the notes having been given. But, on the second ground, it was certainly a fraud in the bankrupt to permit his affidavit to be read at the time when the certificate was allowed; for though it might be true when sworn, it certainly was not true then; and therefore I am clear that the certificate is void.

ASHHURST, *Justice*.—It seems to me, that the interference of a friend, though without the knowledge of the bankrupt, is sufficient to invalidate the certificate, because the test which the legislature requires, is the unbiassed approbation of the creditors. I should be clear on this ground alone, but there is another in this case.

BULLER, *Justice*.—I shall found my opinion solely on the act of 5 Geo. 2. which makes it unlawful for third persons, as well as for the bankrupt, to give money to induce creditors to sign the certificate (s). If money is given in order to deprive the bankrupt of the effect of his certificate, where there are creditors sufficient in number and value, without those who are paid to sign it, the bankrupt shall not be hurt by this fraud upon him; but, if the necessary number and value is completed by persons who are induced to sign by money, *that*, though without the privity of the bankrupt, is a fraud on the creditors at large, and shall not have the intended effect. A certificate is a bar against all creditors, whether they have signed or not, but they shall not be deprived of their remedy against the

(s) 5 Geo. 2. c. 30. § 11.

the bankrupt, unless it is obtained agreeably to the directions of the statute. This is no hardship on the bankrupt. The certificate would not have existed, if it had not been obtained by means which the legislature has reprobated. The bankrupt shall not derive a benefit from acts of others which the law has declared to be illegal and void.

The rule discharged [† 67].

[† 67] Vide, *infra*, 695. Note [3].

1779.

ROBSON
against
CALZE.

* [231]

ARMISTEAD *against* PHILPOT.

Tuesday,
22d June.

ON Wednesday, June the 16th, Kirby moved for a rule, to shew cause, why the sheriff of *Middlesex* should not retain in his hands, for the use of the plaintiff, a sum of money which he had levied for the present defendant, in another action, in which he was plaintiff. The ground of the motion was, that the plaintiff had not been able to levy on the effects of the defendant, to the amount of his demand.

If a plaintiff cannot find sufficient effects of the defendant to satisfy his judgment, the court will order the sheriff to retain, for the use of the plaintiff, money which he has levied, in another action, at the suit of the defendant.

The court, and bar, agreed, that this motion was of the first impression, and Lord MANSFIELD said, he believed there were old cases where it had been held, that the sheriff could not take money in execution, even though found in the defendant's *scrutore*, and that a quaint reason was given for it, viz. that money could not be sold. However the rule was granted, and, this day, Bower having informed the court that he was instructed to oppose it only so far, as that the attorney's bill, in the cause in which the money had been levied, should be paid in the first place, it was made absolute with that qualification.

MILLES *against* FLETCHER.

Wednesday,
23d June.

THIS was an action on a policy of insurance, on the ship the *Hope*, and her freight from *Montserrat* to *London*. The plaintiff went for a total loss. The defendant insisted that he was only entitled to recover for an average loss. The jury found a verdict for a total loss, and, upon a motion for a new trial, the facts of the case appeared to be as follow:—The ship, when proceeding on her voyage, was captured on the 23d of May, by two American privateers, who took the captain, and all the crew, and part of the cargo (which consisted of sugars) out of her. The rigging was also taken away. She was afterwards retaken, and carried into *New-York*, where the captain arrived on the 23d of June, and taking possession

A ship and goods being insured for a voyage, if the ship is taken and recaptured, and on the re-capture the captain, acting fairly for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured shall recover as for a total loss.

1779.

MILLES
against
FLETCHER.

of her, found that part of what had been left of the cargo was washed over-board, that 57 hogshheads of what remained were damaged, and that the ship was leaky, and in such a state that she could not be repaired without unloading her entirely. The owners had no store-houses at *New-York*, where the sugars could have been put while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had. The only method he had of paying the salvage, which amounted to the value of 40 hogshheads of sugar, was by sale of part of the cargo, or the ship. The captain did not know of the insurance. If he had repaired the ship, his expences would have exceeded the freight by more than 100*l*. There was an embargo on all vessels at *New-York* till the 27th of *December*, and, by the destination of his ship, she was to have arrived at *London* in *July*. Under these circumstances, he consulted with his friends at *New-York*, and resolved upon their opinion, and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for, but the person who had agreed to buy her ran away, and the captain left her in a creek near *New-York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the first information he received of it, and the plaintiff immediately claimed as for a total loss from the underwriters, and offered to abandon.

Lord MANSFIELD told the jury, that, if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss.

The *Solicitor General* shewed cause, and was to have been followed by *Dunning*, and *Davenport*, but Lord MANSFIELD stopped them.—*Lee*, and *Baldwin*, for the plaintiff.

Lord MANSFIELD,—The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the court in the cases of *Goss v. Withers* (1), and *Hamilton v. Mendes* (u). I read both those cases over last night, and I think that from them, the whole law between insurers and insured as to the consequences of capture and recapture may be collected. Wherever a question of law arises at *nisi prius*, I propose a case, or grant one when asked for by the counsel, and I avoid as much as possible blending fact and law together, having seen the inconvenience of it in *Poole v. Fitzgerald*.

(1) *M. 32 Geo. 2. 2 Burr. 683.*

(u) *T. 1 Geo. 3. 2 Burr. 1198.*
Since reported, 1 *Blackst. 276.*

1779.

MILLES
against
FLETCHER.

Fitzgerald (v). But, on the trial of this cause, it did not appear to me, that there was any question of law, and no case was asked for. It was impossible to ask for one, till the facts were ascertained; and, when they were, it would have been impossible to state them in any way which could have left a doubt on the law. It was not contended, that a capture necessarily amounts to a total loss as between insurer and insured; nor, on the other hand, that on a capture and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended, that the captain has an arbitrary power by his act, to make the loss either partial or total, as he pleases. A great deal has been said about what the Admiralty could or would have done in such a case, in order to pay the salvage. As to that, if no owner appeared, they would condemn the whole; but if they saw from the ship's papers, that there was one, they would not. If there were different claimants of the ship and cargo, they would leave it to them to say what part should be sold, and, if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all *that* is foreign to the present question, which is singly this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or only a partial stoppage, as in the case of *Hamilton v. Mendes*. In that case, and in *Goss v. Withers*, great stress was laid on the situation of the ship and cargo, at the time when the insured had notice, at the time of the offer to abandon, and at the time of the action brought. No cases say, that the bare existence of the hulk of the ship prevents the loss being total. In *Hamilton v. Mendes* it is laid down, that "if the voyage is lost, or not worth pursuing, if the salvage is high, if further expence is necessary, if the insurer will not at all events undertake to pay the expence, &c. the insured may abandon, notwithstanding a recapture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ship in sight; no means of resistance; all the crew was taken out, and part of the cargo; and the rigging also taken away. Afterwards the ship was retaken, and brought into *New-York*. When she was brought there, it still continued a total loss. Neither the insured, nor the insurers, had any agent in the place. The court of Admiralty must have proceeded *secundum equum & bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon (which was when the captain came to *England*), and when the action was brought,

it

(v) *E. 23 Geo. 2. cited in Goss v. Withers.*

1779.

MILLES
against
FLETCHER.

it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this is, that the loss was total indeed, but that the captain made it so by his improper conduct, for that, on his taking possession of the ship, the loss became partial, and that he ought to have pursued the voyage. But is this defence true in fact? The captain, when he came to *New-York*, had no express order, but he had an implied authority from both sides, to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the under-writer must answer for the consequences of, because this is within his contract of indemnity. Suppose there had been no insurance, what ought the captain to have done? 1. As to the cargo; according to the course of the voyage, the ship should have arrived at *London* in *July*. On the capture, part had been taken out, some was washed over-board, 57 hogsheds damaged, and the whole, from the leakiness of the vessel, in a perishable state. There were no store-houses, nor could the ship proceed in the state she was in. The crew was gone, and an embargo laid on till *December*. What, shall a cargo which was intended to arrive at *London* in *July*, be kept in a perishable state at *New-York*, in a leaky vessel, till *December*? 2. As to the ship; it was certainly better to sell her, than bring her to *London*. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If she had been brought home, the expence of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the under-writers; but the argument drawn from thence is a fallacy, for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture, and it appears that he suffered so much, that it was not worth while to pursue the voyage. The whole voyage was lost. As the captain did not know of the insurance, he had no temptation to give the turn of the scale to one side or the other. I left it to the jury to determine, whether what the captain had done, was for the benefit of the concerned. If they had found that it was in words, where would have been the question of law?

[235]

The rule discharged [† 68].

[† 68] *Vide Baille v. Modigliani*, *Rep.* 187. *Mitchell v. Edie*, *B. R. H.*
B. R. H. 25 *Geo.* 3. *Cazali v. St.* 27 *Geo.* 3. 1 *Term Rep.* 608.
Barbe, *B. R. H.* 26 *Geo.* 3. 1 *Term*

1779.

FISHER, *qui tam*, &c. against BEASLEY.Wednesday,
23d June.

THIS was an action of debt on the statute of Queen Anne (*w*), for taking more than at the rate of five per cent. by the year, for the loan of money. The case was this: One Grindall had borrowed 100*l.* of the defendant, for which he had given him a bond conditioned for the payment of the principal and interest, at the rate of 5*l.* per cent. at the end of six months. He also paid two guineas to the defendant, as a premium, at the time when the money was advanced. At the end of the six months the capital was repaid, and 2*l.* 10*s.* for interest. The action was brought within a year after the payment of the capital and interest, but more than a year after the two guineas were paid, and the money advanced. LORD MANSFIELD, at the trial, was of opinion, that the usury was complete, and the penalty incurred, when the premium was paid, and therefore nonsuited the plaintiff [15].

If a sum of money is lent upon an agreement to pay legal interest, and a premium over and above is paid when the money is advanced, such premium not of itself exceeding the legal interest, the security is void, but the penalty is not incurred till more than legal interest is actually received.

On Tuesday, the 8th of June, Wood obtained a rule to shew cause, why the nonsuit should not be set aside, and a new trial granted; and, on Tuesday the 15th of June, the case was argued, by Bearcroft, and Wood, for the plaintiff, and the Solicitor General, Dunning, and Morgan, for the defendant.

For the defendant, it was contended, that the offence was committed at the time when the two guineas were received, and that it would have been usury although neither the interest nor the capital had ever been paid. That the contract was not to pay 4*l.* 12*s.* per cent. for half a year, but to give two guineas for the loan of a sum of money, for which legal interest was also to be paid. *Lloyd v. Williams* (*x*) was cited, and a case of *Mallory v. Bird*, mentioned in *Pollard v. Scoly* (*y*), where it is said, "That if a man contract to have twenty pounds for the loan of a hundred, and take nothing, he is not punishable by the statute (*z*), but if he taketh any thing, if but one shilling, this is an affirmation of the contract, and he shall render for the whole contract."

[236]

BULLER,

(*w*) 12 Ann. st. 2. c. 16.

[15] By st. 31 Eliz. c. 5. § 5. all *qui tam* actions upon any statute made or to be made (except the statute of tillage) shall be brought within one year after the offence committed.

(*x*) C. B. M. 11 Geo. 3. 3 Wils.

250. since reported in 2 Blackst. 792.

(*y*) C. B. E. 25 El. Cro. El. 20.

(*z*) 13 Eliz. c. 8. That statute revived the statute of 27 H. 8. c. 9. and the words there are, that the penalty shall be incurred if the party "have, receive, accept, or take," &c. § 3. 5.

1779.

FISHER
against
BEASLEY.

BULLER, *Justice*, said, that the answer given by Astor, *Justice*, to that case, when it had been cited on some former occasion, was, that it meant one shilling above the legal interest.

For the plaintiff, it was observed, that the case of *Mallory v. Bird* is only a loose note of the reporter. That there are two distinct provisions in the statute of Queen Anne. 1. That all bonds, contracts, and assurances for the payment of any principal, or money, to be lent, whereupon or whereby there shall be reserved or taken above 5 per cent. shall be utterly void. 2. That all persons, who shall upon any contract, take, accept, and receive for the forbearing or giving day of payment, more than at the rate of 5 per cent. per annum, shall forfeit treble the sum lent. That under the first, the offence is complete as soon as the contract is made, though nothing has been paid for the loan; but, to incur the penalty, more than the legal interest must have been actually received. That the contract here was to forbear for six months, and 2*l.* 2*s.* which was all that had been taken, accepted, and received, more than a year before the bringing of the action, was less than at the rate of 5 per cent. by the year; but that, when the additional 2*l.* 10*s.* was paid, then, and not till then, the offence for which the penalty is given, was committed; for that, till the payment, the law allowed the party time to repent, and to avoid incurring the penalty by relinquishing the usurious interest. They cited *Brown v. Fullbye* (a), where it was held, that when for the loan of 80*l.* a bond was given to pay 90*l.* at the end of the year, the penalty for taking more than 10*l.* per cent. (the legal interest at that time, was not incurred, although the 90*l.* had been rendered, because the lender had not actually taken and received more than the legal interest; but that the security was void; *Boddy v. Tuffell* (b), *Martin Van Hanbeck's Case* (c), and *Hawkins's Pleas of the Crown*, title *Usury* (d), where the same distinction is made, were also cited.

[237]

The court took time to consider, and this day, Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—It became material, in this case, to determine, when the usury was complete. One side contended, that it was so upon the payment of the premium, and I long inclined to that opinion, because it was paid *ex nomine* as above legal interest [c]. But I am now satisfied,

(a) *G. B. T.* 19 *El.* 4 *Leon.* 43.

(b) *Seacc. T.* 30 *El.* 3 *Leon.* 205.

(c) *Seacc. T.* 30 *El.* 2 *Leon.* 38.

(d) *B. 1. c.* 82. § 8.

[c] It is not usury for a country banker in discounting bills to take over and above the 5 per cent. discount, a

commission, agreeable to the usage, upon the amount of the bill. *Fenson v. Parry*, *B. R. M.* 21 *Geo.* 3. 2 *Term Rep.* 52. *Winch v. Fenn*, *G. H. Sittings after H.* 26 *Geo.* 3. *cor. Buller*, *J. ibid.* n. (c).

fied, as we all are, that the offence was not complete till the half year's interest was received. There are two branches of the statute. Under the first, every agreement, contract, and security, for more than legal interest, is void. Therefore the bond given to the defendant in this case was void. But under the second, the penalty is incurred only by *taking, accepting, and receiving*, more than legal interest. All the authorities lean this way, both ancient and modern. In *Lloyd v. Williams* more than legal interest had been paid at first.

The rule made absolute.

1779.

FISHER
against
BRASLEY.

The End of TRINITY Term 19 Geo. III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Twentieth Year of the Reign of GEORGE III.

1779.

WELSH *against* HOLE.Saturday,
6th Nov.

If a plaintiff compromise the debt and costs with the defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he gave notice to the defendant not to settle with the plaintiff till his bill should be paid.

ON a rule to shew cause, why the defendant should not pay to the plaintiff's attorney his bill of costs, the case was this: In an action of assault there was a verdict for the plaintiff, damages 20 l. judgment, and a writ of error brought. Pending the writ of error, the plaintiff personally compromised the debt with the defendant (who had laid in jail two years) and executed a release; having accepted of ten guineas for the debt and costs.

The *Solicitor General* argued in support of the rule,—*Cowper* for the defendant.

LORD MANSFIELD,—An attorney has a lien on the money recovered by his client, for his bill of costs: if the money come to his hand, he may retain to the amount of his bill (a). He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been af-

(a) *Vide supra*, p. 104.

signed,

signed, after notice. But I think we cannot go beyond these limits. Though there may be some room to think that there was collusion here to cheat the attorney, yet, on the other hand, ten guineas may be a reasonable compensation from a man who has lain two years in jail. Besides, this application goes to the extent of controverting the validity of a payment of the *whole* debt and costs to a plaintiff without the privity of his attorney, and it would be too much to say, that a defendant shall not transact the business of a cause with the plaintiff himself, in a case where there has been no notice not to do so from the attorney, either express or implied—nothing even like saying, “I have no security for my bill,” or, “I shall never be paid unless the plaintiff recover in this action.”

The rule discharged [C].

[C] *Vide Griffin v. Eyles, C. B. H. 29 Geo. 3. 3. H. Bl. 122.*

1779.

WELSH
against
HOLE.

The King *against* STRATTON and Others.

Thursday,
11th Nov.

AN information had been filed *en officio*, by the Attorney General, in consequence of a resolution of the House of Commons, against the defendants, for imprisoning the governor (Lord Pigot) and subverting the government of the settlement at Madras, where they were members of the council. The defendants had pleaded, and the parties were at issue, and notice of trial given for the Sittings after last term; but the prosecutor countermanded the notice, and, on *Tuesday* the 9th of November, the Solicitor General applied for a rule to shew cause, why the information should not be quashed, suggesting as the ground of the application, that another was ready to be filed, which stated the offence more particularly, and was better adapted to the nature of the charge. The rule was granted, and cause was, this day, shewn, by Dunning, Wilson, Arden, and Erskine.

The court will not give leave to quash an information filed *ex officio* by the Attorney General.—He may stop the proceedings upon it by *noni. prosequi*, and file another.

They said, there never had been an application of this sort, but that, in the case of *Rex v. Philip Carteret Webb* (a), where the prosecution was by indictment, on a motion to quash the first, another having been found, the court would not permit it, but upon terms, and by consent; and said, that it was by no means a motion of course. That in all cases where indictments have been quashed on the motion of the prosecutor, it has been on the ground of *insufficiency* (b), which was not pretended in the present instance.

[426]

(a) *E. 4 Geo. 3. 3 Burr. 1468. Since reported, 1 Blackst. 460. H. 4 Car. 1 Cro. Car. 147. Rex. v. Swan & Jeffreys, Fost. 104.*

(b) *Vide Sir William Wuthipole's Case,*

1779.
The KING
against
STANTON.

instance. That in the case of *Rex v. Purnell* (c), which was an information filed *ex officio* by Sir Dudley Ryder, then Attorney General, against the defendant as vice-chancellor, and a justice of peace in the university of Oxford, the Attorney-General had put an end to the first information, without any application to the court, by a *noli prosequi*; but that he had done this on the express orders of the King, which order was stated in his warrant to the master of the Crown-office (d) to enter the *noli prosequi*. That, at all events, the court would not grant the motion without obliging the prosecutor to pay costs (e).

The Solicitor General, in support of the rule, observed, that the defendant could not suffer any injury by the quashing of the information, because the crown might go on to trial, and judgment, on the new one, notwithstanding the pendency of the other; for that, on indictments or informations for crimes, the pendency of another prosecution for the same offence cannot be pleaded, as it may to informations for penalties (f) [1]. He said, that leave to quash indictments is often granted in the first instance, without a rule to shew cause.

Lord MANSFIELD having asked the Solicitor General if there was any authority or precedent for quashing an information *ex officio* upon the application of the prosecutor, he admitted, that he knew of none; and his Lordship said, that if it was proper to stop the information, he did not see why the Attorney General might not do it by entering a *noli prosequi*, without the interference of the court.

BULLER, Justice,—What the Solicitor General has stated, viz. that the pendency of the first information would be no plea to the second, is decisive against this motion. It is certainly not of course to quash informations. All the litigated cases are upon *insufficiency*, and, if the court has even permitted it in the first instance, it has been because they gave credit to the counsel in stating the insufficiency.

The rule discharged.

(c) 1 Wilson 239. Since reported, 1 Blackst.

(d) Sir James Burrows.

(e) H. 6 Geo. 2. *Rex v. Moore*. 2 Str. 946.

(f) Sir William Withpole's Case, *Rex v. Swan & Jeffreys*.

[1] *Hawkins*, (B. 2. c. 26. § 63.) says, that another information depending may be pleaded in abatement to an

information *qui tam*, and cites *Cro. El.* 261. 1 Roll Rep. 49, 50. 134. But he says nothing on that point as to other informations. In B. 2. c. 34. § 1. he says, generally, that another prosecution depending is no good plea to an indictment, as it is to an appeal or information; but he refers to the former passage, and therefore probably meant only *qui tam* informations.

1779.

RIGHT, Lessee of CATER, against PRICE
and Others.Friday, 12th
Nov.

UPON an ejectment, tried at the last Assizes for the county of Gloucester, a special case was reserved, which stated the following facts: On the 5th of December 1777, one Bridges was sent for, to make the will of one Wyatt Cater, (under which the defendants claimed,) and received his directions accordingly. It was prepared on five sheets, and a seal affixed to the last, and also the form of the attestation written upon it. The will was then read over to the testator, in the presence of the three witnesses who afterwards subscribed it, (one of whom was Bridges,) and he set his mark to the two first sheets, in their presence, and attempted to set it to the third, but, being unable from the weakness of his hands, he said, "I can't do it, but it is my will." After this, the three witnesses went away, being desired to come again. On the day following, Bridges, in the presence of two other persons, not being the two other subscribing witnesses, said to the testator, "Will you sign your will?" He said, he would, and again attempted to sign the two remaining sheets, but was not able. Then Bridges went away, and returned the next day with the two other subscribing witnesses, when the testator being in a state of insensibility, Bridges proceeded to write the form of an attestation on the second sheet, and he and the two other witnesses put their names to it, in the room where the testator lay. He died two days afterwards.—The question was, Whether this will was duly executed for passing lands, according to the statute of frauds?—The lessor of the plaintiff was the heir at law.

If a testator is in a state of insensibility when his will is attested, the will is not duly executed according to the meaning of the statute of frauds, although he be corporally present.

(The words of the statute are, "That the will shall be signed by the deviser, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said deviser, by three or four credible witnesses (a).")

The case was argued, by Cowper, for the plaintiff, and Adair, Serjeant, for the defendants. [242]

Adair mentioned, before the argument, that the case was imperfect, in not stating, as the fact was, that all the five sheets were in the room, and annexed to each other, at the time of the different subscriptions; but Lord MANSFIELD said, he had no doubt it was so, from the manner in which the case was drawn up, and desired Cowper to go on, as if that had been expressly set forth.

Cowper,

(a) 29 Car. 2. c. 3. § 5.

1779.

RIGHT
against
PRICE.

Cowper.—This will was not attested agreeably to the meaning of the statute. In *Shires v. Glascock* (a), the will was signed by the witnesses in an adjoining room, having a window, which was broken, between it and the room where the testator was, and it is expressly stated, that he *might* have seen the witnesses. The reason for requiring the attestation in the testator's presence is there mentioned to be to prevent the obstruction of another will. There had been several other cases of the same sort, where, if the testator *could* see the witnesses sign, the court has presumed that he *did*. But here the testator being in a state of insensibility, he could not possibly know what was passing. He was indeed corporally present, but his mind was not there, no more than if his dead body had been in the room.

Adair, Serjeant.—It does not clearly appear what is meant by the word “*insensibility*.” It is certainly something considerably short of death, and, if the testator was alive, I do not see how it can be said, that the will was not attested in his presence. The question is, Whether the testator, having done all that was necessary on his part, (for nothing is disputed but the validity of the attestation,) and the attestation having been made according to the words of the statute, a fair transaction shall be set aside, because a formality required according to an implied intention of the legislature has not been complied with? The court has been very liberal in construing the formalities prescribed by the statute. A *qual* signing is one of them; yet that has been dispensed with, as appears by a case in *Skynner* (b). As to the attestation, the expression at the end of the case of *Shires v. Glascock* seems to go farther than the line drawn by Mr. *Cowper*; for it says, the signing of the witnesses would be sufficient, although the testator should be sick in bed, and the curtain drawn. In such a case, he *could not*, by any reasonable presumption, be supposed to have it in his power to see them. Even in the present case it does not appear, but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names. If he had been perfectly in his senses while he signed, and till they began to attest the will, and had then been seized with a delirium, would not the attestation, if completed immediately, have been sufficient? The principal intent of the act, in requiring the solemnity of the attestation by witnesses, is truly stated in *Shires v. Glascock*, viz. to prevent the obstruction of another

[243]

(a) C. B. E. 3 Jac. 2. 2 Salk. 688. S. C. in *Corrib*. 81.

(b) R. R. H. 36 & 37 Car. 2. 3 Skyn. 227. The will in that case was all written by the testator's own hand.

Vide, also, *Le Mayne v. Stanley*, C. B. E. 33 Car. 2. 3 Lev. 1. S. P. 65. “The sealing is a signing.” *Dis per Hobb.* *Ch. J. Lee v. Libb*, B. R. M. 1 W. & M. 1 Sh. 68, 69.

another will for the true one; but there was no danger of that sort here, since the testator had actually signed the will he meant to execute before he became insensible. I have been informed of a case which was before this court very lately, by a gentleman who was counsel in it, in which the word "*presence*" was construed to mean actual, corporal presence. It was a *quo warranto* from Plymouth. By the charter of that borough, seven aldermen must be present when a new one is elected. To make up that number, at the election the legality of which was questioned, one who had been in a state of absolute idiocy for several years was brought to the hall, and it was held, that this was sufficient to satisfy the charter; and the court refused either to grant an information, or an issue to try the sanity.

LORD MANSFIELD, — There are many particular circumstances in this case besides the general question. The testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole will. There never was a signature as of the whole. The court, to be sure, would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with. It was upon that principle that *Shires v. Glascock*, and other cases of that sort, were decided. But this is not a measuring cast, where there is no room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental purposes. It was no sudden delirium, or suspension of the understanding. In such a case, perhaps, the court would lay hold of a very slight presumption. Another thing: it is usual in precedents of wills to say, that the witnesses subscribed *at the request* of the testator. That indeed is not *expressly* required by the statute, but the practice shews the general understanding, and the nature of the thing *implies* a request.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, — I am of the same opinion. The attestation in the testator's presence is as essential as his signature, and all must be done while he is in a capacity to dispose of his property. *Shires v. Glascock* was determined soon after the statute passed, when the reason and meaning of the clause in question were exactly known. Here the trunk remained, but the man was gone. He could not know whether the will that he had begun to sign was that which the witnesses attested. He was dead to all purposes or power of conveying his property. As to the signing of the testator, it has never been and cannot be dispensed with. The courts have only had occasion to de-

1779

RIGHT
against
PRICE.

[344]

1779. cide, in different cases, what shall be a signing within the true meaning of the statute [2].

The *Posse* to be delivered to the plaintiff.

[2] The statute of frauds is often supposed to have been made upon great consideration; on an attentive perusal, however, it will not appear to have been very accurately penned. It is I believe universally understood to be the meaning of the statute, that the testator must sign in the presence of the subscribing witnesses [1]. Yet there is no express provision for that purpose in the clause (§ 5.) describing the solemnities

which are to attend the execution. It is as universally understood that an express written revocation must be executed with the same solemnities as an original will; but, in the clause (§ 6.) relative to such revocations, the subscription of the witnesses is not directed, while, on the other hand, the signing by the testator in their presence is in such case expressly prescribed,

[1] But *Vide Grayson v. Atkinson, Canc. 1752*, where Lord Hardwicke determined, that it is not necessary, in the case of a will, that the testator shall sign in presence of the witnesses; and that it is sufficient if he acknowledge his hand-writing to them all, though at different times. 2 *Vex.* 454. See, also, 3 *Mod.* 218, & *Lee v. Libb, B. R. M.*, 1 *W. & M.* 1 *Show.* 68, 69. *Diſt. per Dolbin, S. P.* and *Stonehouse v. Evelyn, Canc. E.* 1734, where the

same was determined by Sir Joseph Jekyll. 3 *P. W.* 252 And in *Ellis v. Smith, Canc. H. & M.* 27 *Geo.* 2. Lord Hardwicke, assisted by *Willis, Ch. J. Strange*, Master of the Rolls, and the Chief Baron, decided that a will attested by three witnesses, in the presence of the testator, and acknowledged by him in their presence to have been signed and sealed by him, but not signed in their presence, was a good revocation of a former will under § 6.

Fiday, 12th
Nov.

WOOLLET against CLOUTMAN.

ACTIONS for use and occupation cannot be maintained in the court of conscience in *London*.

AFTER a verdict for the plaintiff in an action, in this court, for use and occupation, the damages being only 1 *l.* 7 *s.* 6 *d.* *Baldwin* obtained a rule to shew cause, why the defendant should not have leave to suggest on the roll, that the damages recovered were under 40 *s.* and that the defendant, at the time when the action was brought, was an inhabitant, &c. in the city of *London*, and liable to be sued in the court of conscience there, under the statute 3 *Jac.* 1. c. 15. [1].

[245]

That statute (*sect.* 4.) enacts, that if it shall, in any action of debt or *assumpsit* prosecuted any where out of the said court of requests, appear that the debt to be recovered doth not amount to 40 *s.* and the defendant [2] shall prove by

[1] This was the first of those courts of summary jurisdiction called courts of conscience. It had been erected before, but did not receive the sanction of the legislature till this statute of *Jac.* 1.

[2] By § 2. the right of suing in this court, is only given to "every citizen and freeman or any other person inhabiting within the city or its liberties, being a victualler, tradesman, or labouring man," against persons of the same

by sufficient testimony, or his own oath, that he was inhabiting and residing in *London*, or the liberties thereof, when the action was commenced, the plaintiff shall not have any costs of suit, but shall pay the defendant his costs. But, by *sect. 6.* it is provided, that nothing in the act shall extend to "any debt for any rent upon any lease of lands

"or tenements, or any other *real contracts*, or any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court."

Dunning now shewed cause. He insisted, that this case was within the exception, the words of which are not "any action of debt for rent," but "any debt for rent;" and therefore the substance not the form of the action was what the legislature had in view, the intention being to prevent questions of the title from coming before this inferior jurisdiction. He mentioned a similar case which had been before the court some time ago, on the statute erecting the court of requests in the *Tower Hamlets* (a), in which there is an exception (b) in the very same words with that in the act of *James I.*

The *Solicitor General*, and *Baldwin*, agreed in support of the rule. They stated, that such actions had been usually brought in the city court of conscience, and contended, that, by "other *real contracts*," was meant, covenants for rent by deed, and that the exception only extended to actions for rent upon specialties.

1779.
WOOLLEY
against
CLOUTMAN.

[246]

Lord MANSFIELD, — It may have been usual to bring such actions in the city court; if the defendant makes no objection, the cause proceeds of course; but there is no instance where the point has been litigated, and the jurisdiction allowed. The title may come in question in this sort of action; if brought, for instance, by a devisee or purchaser. We think this case is within the exception; and,

same description. The 4th section, which gives the defendant costs when the damages are under 40 s. makes it necessary for him to prove that he was inhabitant and residing of the city as above, but says nothing restrictive of the description of the plaintiff. However, I should suppose both clauses must be taken together, and that the defendant ought to shew that the plaintiff was such a person as is authorized by § 2. to sue in the city court. So it seems to have been understood in *Hickman v. Caley*, B. R. M. 13 Geo. 3. 2 Str. 1120; and in *Brampton v. Crab*, B. R. H. 3 Geo. 1. 1 Str. 46. and *Pitts v. Carpenter*, B. R. T. 16 Geo. 2. 2 Str.

1191. the suggestion stated both the plaintiff and defendant to be citizens of *London*. The affidavit in this case of *Woolley v. Cloutman*, stated only the defendant's residency, and the rule did not go to the suggestion on the roll of any thing touching the plaintiff's description, or where he inhabited. — By 23 Geo. 2. cap. 30. which established the court of the *Tower Hamlets*, there is no restriction as to the plaintiff, and any person may be sued who resides, keeps a shop, shed, stall, or stand, seeks a livelihood, or trades, or deals, within the district (§ 5.)

(a) 23 Geo. 2. c. 30.

(b) § 20.

1779.

WOOLLEY
against
CLOUTMAN.

and, in the case alluded to by Mr. *Dunning*, we had all formed the same opinion; but it was compromised. It was trespass against the officers of the court of conscience of the *Tower Hamlets*, for taking goods in execution upon a judgment in that court [1].

BULLER, *Justice*, said, the construction put upon the words, "*real contracts*," was very improbable, because, at the time when the act passed, it was not necessary that leases should be in writing, much less by deed, which even yet is not required. That, before this action for use and occupation came to be used, (after 11 *Geo. 2. c. 19. § 14.*) it was common to bring debt for rent on parol leases.

The rule discharged (a) [† 69].

[1] By 23 *Geo. 2. c. 30. § 1.* execution is given against the body or goods. *Burrowes*, *infra* 259, and *Wiltshire v. Lloyd*, *infra* 366.

[† 69] *Vide Stean v. Holmes, C.B. 2.*

(a) *Vide* the next case, also *Aileway v. 11 Geo. 3. 2 Blackst. 754.*

Monday, 15th
Nov.

WASE, Administrator, against WYBURD.

If an action of *assumpsit* is brought against an inhabitant of *Middlesex* by an administrator, and the damages found are under 40*s.* the defendant is intitled to have that suggested on the roll in the same manner as if the plaintiff had sued in his own right.

* [247]

THIS was an action of *assumpsit* upon a running account, and the statute of limitations being pleaded, it appeared, on the trial, that none of the items were within the six years, except one article of 10*s.* and the plaintiff accordingly had a verdict only for that sum. The defendant having applied for leave to suggest on the roll, that he lived, at the time of the action brought, in the county of *Middlesex*, and was liable to be summoned to the county court under the statute of 23 *Geo. 2. c. 33.* by which, in such cases, the plaintiff is not to have his costs, but to pay double costs to the defendant, a rule to shew cause was granted.

Howorth now shewed cause, and contended, that this case was not within the meaning of the act, as persons suing in the * character of administrator or executor, are not liable to the payment of costs even where there is a verdict against them.

The *Solicitor General*, on the other side, insisted, that the defendant had a right to the suggestion whatever consequence it might have, and said, that if it should not entitle him to costs from the plaintiff, it would exempt him from the payment of costs.

LORD MANSFIELD asked if there was any exception as to administrators in the statute, and it appeared that there is no such exception.

The rule made absolute (a)

(a) *Woolley v. Cloutman*, *supra*, p. *Wiltshire v. Lloyd*, *infra* 381.
244. *Aileway v. Burrowes*, *infra* 263.

Monday, 15th
Nov.DINGWALL *against* DUNSTER.

1779.

THE plaintiff, as indorsee of a bill of exchange for 400*l.* dated 10th July 1774, and payable in five months, brought an action of *assumpsit* against the defendant, as acceptor. The cause came on to be tried before Lord MANSFIELD, at the last Sittings for *Middlesex*, when two sorts of defence were set up. 1. That the bill was given for money won at play. 2. That the plaintiff by his conduct, (though not in express terms,) had agreed to discharge the acceptor, and seek his remedy only against the drawer. To prove that the money was won at play, the defendant's counsel called the drawer, (one *Wheat*,) who had been discharged under an insolvent debtors' act; but, as his future effects still remained liable to the debt, his Lordship rejected him as an inadmissible witness [† 70]; and the cause went to the jury only on the other question [1]. They found for the defendant; upon which the plaintiff obtained a rule to shew cause why there should not be a new trial, which came on to be argued this day. The most material facts of the case were as follow: The bill was accepted by the defendant, merely to lend his credit, and accommodate the drawer. *Fitzgerald*, the payee, indorsed it to the plaintiff, and delivered it to him, in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for accepting it, and that *Wheat* was the real debtor, wrote to one *Ready*, (*Wheat's* attorney,) on the 6th February, and on the 4th of November 1775, pressing him for the payment. *Dunster*, on the 13th of February 1775, wrote a letter to *Dingwall*, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who had been sent from him to *Dingwall* on the business, that *Wheat* had taken up the bill, and gave another, to *Dingwall's* satisfaction. It did not appear that *Dingwall* took any notice of that letter. *Dingwall* for some time received interest upon this bill from *Wheat*, and also the principal due by another bill, which was made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years

Nothing but an express declaration by the holder will discharge the acceptor of a bill of exchange.

[248]

[† 70] But, *vide* *Abrahams, qui tam*, 1. *Burr*, B. R. T. 8 Geo. 3. 4 *Burr*. 2251.

[1] If it had been proved, that the bill was for money won at play, it would have been void in the hands of

the plaintiff, though an innocent indorsee for a valuable consideration. *Vide* the case of *Bower v. Hampton*, B. R. T. 14 Geo. 2. 2 Str. 1155. and *Lowe v. Waller*, T. 21 Geo. 3. *infra* 736.

1779.

DINGWALL
against
DUNSTER.

to elapse without calling upon *Dunster*, or treating him as the debtor.

Dunning, and *Cowper*, in support of the verdict.—The *Solicitor General*, *Peckham*, and *Baldwin*, for the plaintiff.

For the defendant, it was argued, that the holder of a bill of exchange may discharge the acceptor without receiving payment, or delivering up or cancelling the bill. That such discharge may be implied as strongly from circumstances in the conduct of the holder, as if he had expressed it in direct words. That the question was a mere question of fact, to be determined by a jury; and the behaviour of the plaintiff in this case shewed clearly, that he had abandoned all recourse against the acceptor. They cited a case of *Black v. Peele*, which was first tried before Lord MANSFIELD, and afterwards before DE GREY, *Chief Justice*, and also *Walpole and others v. Pulteney*, in the court of *Exchequer*, which had been tried a few months ago, and in which, they said, there had been an implied discharge of the acceptor, and, upon that ground, (the jury having found a verdict for the plaintiff) the court had granted a new trial.

[249]

On the other side, it was insisted, that there was no case where any thing short of an *express* discharge had been held to preclude the holder from having recourse upon the acceptor. That silence towards him, for any length of time within the years prescribed by the statute of limitations, is not enough. The holder may proceed against a drawer or indorser, (if he has given proper notice of the non-payment by the acceptor when the bill fell due,) and recover part against him, and yet recur, for the remaining part, to the drawer. In the case of *Black v. Peele*, there was an *express* discharge. The case was this: One *Dallas* was the drawer, *Peele* the acceptor, and *Black* an indorsee. *Black* arrested *Peele*, but finding that no consideration had been given for the acceptance, his attorney took a security from *Dallas*, and sent word to *Peele*, "that he had settled with *Dallas* and he need not trouble himself any further." *Dallas*, afterwards became a bankrupt, and then *Black* demanded payment of *Peele*. In *Walpole v. Pulteney*, a book of the plaintiff's own was produced, in which the bill was entered, and over against it this memorandum, "*Mr. Pulteney's acceptance annulled* [2]."

Lord MANSFIELD,—There is no doubt but a holder of a bill may discharge any of the parties, but there is this difference

[2] That case was tried, a second time, at *Guildhall*, at the Sittings after this term, before *Skyner* Chief Baron, when *Alexander*, who had indorsed the bill to *Walpole*, was produced as a witness on the part of the defendant, and

swore, that *Walpole* had positively agreed to consider *Pulteney's* acceptance as at an end. The jury found for the defendant. *Walpole* had kept the bill from 1772 to 1775, without calling upon *Pulteney*.

1779.

DINGWALL
against
DUNSTER.

ference between the acceptor and the other, that the acceptor is first liable, and, to be entitled to have recourse against him, it is not necessary to shew notice given to him of non-payment by any other person. In the present case the question is, whether any thing has in fact been done to discharge the defendant. The plaintiff being apprised that *Wheate* was the person for whose benefit the bill was drawn, did right in considering him as his debtor, and recurring to him for payment. The defendant was sensible of his kindness in not resorting to *him* in the first instance, and wrote to thank him for it. No use was made at the trial, nor on the present argument, of what might have been a material circumstance, *viz.* the defendant's having written to the plaintiff, that he had been informed by a person who had been sent from him to the plaintiff to talk with him about the bill, that it had been delivered up to *Wheate*. Probably the fact did not warrant him in this assertion. If the plaintiff, by any thing in his conduct, had confirmed him in such a belief, it might have altered the case; but nothing of that sort appears. I think there is no ground to say he was discharged.

WILLES, *Justice*,—I am of the same opinion. I do not think silence can discharge the acceptor. No case of a tacit discharge has been produced. In *Black v. Peele*, the discharge was in express words. In *Walpole v. Pulteney*, the case was put upon the entry in the book being an express discharge. Besides, that case is still depending.

[250]

ASHHURST, *Justice*,—I am of the same opinion. An acceptor makes himself a debtor, and his case is different from that of the other parties to the bill. Nothing but an express discharge will do. The defendant endeavours to prove a discharge from letters, but they do not come up to it, and the conduct of the plaintiff amounts only to indulgence towards the acceptor.

BULLER, *Justice*,—I am clearly of the same opinion. Nothing but an express agreement can discharge an acceptor. And nothing of that sort appears in this case. The plaintiff's conduct meant nothing more, but that he would try to recover from the drawer, who was the original and true debtor, if he could.

The rule made absolute [† 71].

[† 71] *ELLIS v. GALINDO, B. R. M.*
24 Geo. 3.

Assumpsit, by the payee of a bill of exchange, for 30 *l.* against the acceptor. The drawer and acceptor were brothers. When the bill became due, the plaintiff received of the drawer, 31 *l.* 5 *s.* 4 *d.* and, at the same time,

the following indorsement was made on the bill; *viz.* "Received on account of this bill 31 *l.* 15 *s.* 4 *d.* Balance remaining 26 *l.* 14 *s.* 8 *d.* I promise to pay to Mr. *Thomas Ellis* within three months from the date of this." Signed by *James Galindo*, who was the drawer. The balance was never paid, and, at the distance of three years, this action

1779.
DINGWALL
against
DUNSTER.

was brought against the acceptor. The cause was tried before Lord Mansfield, who thought the acceptor was discharged, and non-suited the plaintiff.

On a rule to shew cause, why there should not be a new trial, Lord Mansfield said, he did not think the case at all interfered with the determination in *Dingwall v. Dunster*, which had been cited as a ground for the application. However, the rule was granted.

The Solicitor General (Lee), and Baldwin, for the plaintiff contended, that the indulgence for three months could no more be held to amount to a discharge, than the payment of part; and that it was clear law, that payment of part by the drawer would not discharge the acceptor. An acceptor and drawer stand in different situations. The indorsement was made to prevent an imputation of *laches*, because delay in coming against an acceptor, may discharge a drawer or indorser. But nothing under the limitation of six years will discharge the acceptor.

Lord Mansfield, — The doubt is, whether, instead of a nonsuit, the question should not have been left to the jury, it being a question of intention arising out of the circumstances. The bill was probably an accommodation bill, as the drawer and acceptor were brothers.

WILLES, Justice, — It was established by *Dingwall v. Dunster*, that *laches* will not discharge the acceptor. My doubt is, how far this indorsement necessarily discharges the acceptor, and I think that question ought to have been left to the jury.

BULLER, Justice, — There is no doubt as to the law. It is as has been stated by the counsel for the plaintiff. I rather think the case should have gone to the jury. But I am not therefore of opinion, that there should be a new trial. The indorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and, as the demand is so small, I do not think there should be a new trial.

The rule discharged.

[251]

PLANCHE and Another, against FLETCHER.

Monday, 15th Nov.

If goods are insured on board a ship from London to Nantz, with liberty to call at Ostend, and she is cleared only for Ostend, but sails directly for Nantz, that being the known course of the trade in order to save certain duties both

in England and France, there is no fraud on the underwriter so far as to vacate the policy. — If an insurance is made before the commencement of hostilities, but when every body expects a war immediately, the insurer is not bound to give the underwriter notice, though the ship do not sail till after the war takes place, and the underwriter is liable in case of capture. — The courts in this country do not take notice of foreign revenue laws.

THE Plaintiffs, *Planché* and *Jacquery*, merchants in London, insured goods, "on board the Swedish ship called the *Maria Magdalena*, lost or not lost, at and from London and Ramsgate to Nantz, with liberty to call at Ostend, being a general ship in the port of London for Nantz." There was a declaration in the policy, that the insurance was made on account of "certain persons carrying on trade under the name and firm of *Vallée & du Plessis, Monsieur Lusséaur le Jeune, Guillaume Albert, & Poitier de la Guéule*" The defendant underwrote the policy for 300*l.* at three guineas per cent. The ship's clearances from the custom-house in London, and her other papers, were all made out as for Ostend only, but the ship and goods were intended to go directly from London to Nantz, without going to Ostend. Bills of lading, in the

French language, dated the 8th of July 1778, were signed by the captain in *London*, but purporting to be made at *Ostend*, and that the goods were shipped there to be delivered at *Nantz*. The policy was subscribed by the defendant on the 7th of July, and the lading was taken in between the 24th of July and the 17th of August. The proclamation for making reprisals on French ships, &c. bore date the 29th, and appeared in the Gazette on the 31st of July. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas; one on the 31st of July, and the other on the 7th of August. The ship sailed on the 24th of August, and was taken by a King's cutter on her way to *Nantz*. After her departure from *Gravesend*, the captain threw overboard all the papers he had received from the custom-house at *London*. They had been obliterated by the custom-house officers at *Gravesend*, and were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiff had no connection or share in the ship. Such were the material facts of this case, as they were stated this day, by Lord MANSFIELD in his report, upon a rule to shew cause why there should not be a new trial. The cause had been tried at the last Sittings at *Guildhall*, and a verdict found for the plaintiffs. The grounds of the application for a new trial were two. 1. That there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, and yet never having been designed for that place. 2. That, as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion whether he would chuse for a peace premium to run the risk of capture. Besides the facts above-mentioned, his Lordship stated, that the plaintiffs had produced evidence to shew, that all ships going with goods of *British* manufacture to *France* clear out for *Ostend* without meaning to go thither, and that this is universally understood by persons concerned in that branch of commerce. The reason suggested for clearing out for *Ostend*, and afterwards making bills of lading as from that place, were, that the light-house duties are saved, which are payable when the voyage is known to be directly down the Channel, and that the French duties are less upon goods from *Ostend*, than from *England*.

The Solicitor General, and Bower, for the plaintiffs.—
Dunning, and Davenport, for the defendant.

For the defendant, the fabrication of false and colourable papers, and the suppression of the true destination of the ship, were argued as circumstances of fraud, tending to mislead the underwriter, as to the voyage intended to be insured, and the nature of the risk. But the second objection

1778.
BLANCHET
against
FLETCHER

[252]

1779.

PLANCHE
against
FLETCHER.

jection was chiefly relied upon, and it was said, that it was the duty of the insured to have given the underwriter information, that the ship continued in the River after the proclamation. It was also contended, that in time of war, the exportation of enemy's property, even in neutral bottoms, was illegal, and that an insurance upon such goods was void.

In answer to this, it was said, in the first place, that there was no compulsion, by the terms of the insurance, for the ship to go to *Offend*. If her fixed destination as understood by the underwriters, had been from *England* to *Offend*, and from *Offend* to *Nantz*, the policy would have been otherwise worded; and the course of the trade being notorious, the defendant could not be deceived or misled by her being cleared out for *Offend*. As to the second objection, the rupture with *France* was impending and expected by all the world at the time when the policy was signed. The proclamation did not contain an interdiction of commerce between the two nations; the packets and mails passed regularly between *Dover* and *Calais* long afterwards. There was nothing illegal in exporting or insuring *French* property in neutral bottoms after the proclamation, and the premium on such goods in neutral ships did not rise for a long time after the commencement of hostilities. If the transaction had not been strictly legal, there were cases where the court had refused to grant a new trial on that ground when the objection was against the justice and conscience of the case (a).

Lord MANSFIELD,—This verdict is impeached upon two grounds. 1. It is said, there was a fraud on the underwriters in clearing out the ship for *Offend* when she was never intended to go thither. But I think there was no fraud on them,—perhaps not on any body. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to every body. The reason for clearing for *Offend*, and signing bills of lading as from thence, did not fully appear. But it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Offend* duties, rather than stop the trade, by exacting a tax which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the

(a) They cited *Deerly v. the Ducheſs of Mazarine*, B. B. H. 8 W. 3. 2 Salk. 646. *Smith v. Page*, M. 8 W. 3. B. R. *ibid.* 644. *Sparkes v. Spicer*, B. R. H. 10 W. 3. 2 Salk. 648—S. P. re-

cognized in *Allen v. Peſball*, C. B. M. 18 Geo. 3. 2 Blackſt. 1177. & *ſide* also *Edmonſon v. Macbell*, B. R. T. 27 Geo. 3. 2 Term Rep. 4.

the revenue laws of another [15]. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account. 2. The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in *England and France*, on the 17th of *July*, expected the immediate commencement of a war. I will not say it was actually commenced; but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets at sea; and, as it appeared afterwards, waiting for each other to fight. It does not appear that the goods were *French* property [1]; an *Englishman* might be sending his goods to *France* in a neutral ship. But it is indifferent whether they were *English* or *French*. The risk insured extends to all captures [2], and as to other underwriters signed at the same premium, after the proclamation, it appears that the war risk was in view when the defendant signed. Shall he avail himself of an event which encreases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion that there should not be a new trial.

1779.
PLANCHE
against
FLETCHER.

[254]

The rule discharged [+ 74].

[1] S. P. *Boucher v. Lawson, B.*
R. H. 8 Geo. 2. Cases Temp, Ld. Hardw.
85. 89, 90. *Holman v. Johnson, B.*
R. T. 15 Geo. 3. Cowp. 341. 343.

[1] It was assumed by the counsel
for the defendant, from the names of
the persons in whom the interest was

declared being *French*, and from the
condemnation at the Admiralty.

[2] The description of the risk was
in the usual printed form.

[+ 72] *Vide Henkle v. the Royal Ex-
change Assurance Company, Canc 1749.*
1 Vez. 317.

JOHNSTON and Another against SUTTON.

Monday,
15th Nov.

THIS was an action on a policy of insurance on goods on board the ship *Venus*, lost or not lost, "at and from *London* to *NEW YORK*, warranted to depart with "convoy from the Channel for the voyage (a)."

The cause was tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, and a verdict found for the plaintiffs. The defendant obtained a rule to shew cause why there should not be a new trial, which came on to be argued immediately after the foregoing case of *Planché v. Fletcher*. The facts, upon his Lordship's report, appeared to be these: The ship was cleared for *Halifax* and *New-York*. She had provisions on board, which she had a licence to carry to *New-York*, under a proviso in the prohibitory act of 16 Geo. 3. c. 5. But one half of the cargo, including the goods which were the subject of this policy,

An assurance
of a voyage
expressly pro-
hibited by the
laws of this
country, is
void.

was

(a) *Vide Lilly v. Ewer, supra, H. 19 Geo. 3. p. 73.*

1779.

JOHNSTON
against
SUTTON.

was not licensed, and was not calculated for the *Halifax* market, but for *New-York*. There had been a proclamation by Sir *William Howe* to allow the entry of unlicensed goods at *New York*, and though there were bonds usually given at the custom-house here, by which the captain engaged to carry the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New-York*, declaring, that they were landed there. The commander in chief had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The *Venus* was taken in her passage to *New York* [1], by an *American* privateer.

[255]

Dunning, and *Peckham*, for the plaintiffs.—The *Solicitor General*, and *Lee*, for the defendant.

On the part of the plaintiffs, it was contended, that a verdict agreeable to the justice and conscience of the case, although the transaction might not be strictly legal, would not be set aside by the court. The cases cited on this point in *Planché v. Fletcher* (z), were insisted upon, and a modern case of *Burton v. Thompson* (a), was also mentioned, in support of the same doctrine.

On the other side, it was said, that the plaintiff's counsel were so well convinced that the objection was fatal, that they called for the cryer to nonsuit their clients, but the jury delivered their verdict before he could be found. That there was no imputation on the defendant in making this defence, because, on the face of the policy, it was lawful; for licensed goods might be legally carried to *New-York*. He was to presume that the goods insured were licensed. The insurer has no opportunity of seeing the clearances.

LORD MANSFIELD,—The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to *New York*, and, *in pari delicto, potior est conditio defendentis*. It is impossible to bring this within the cases which

[1] The statute (§ 1.) prohibits all commerce with the province of *New York*, (amongst others,) and confiscates all ships and their cargoes which shall be found trading, or going to, or coming from trading with them. Then there is a proviso (§ 2) excepting ships laden with provisions for the use of his Majesty's fleets or garrisons, or the inhabitants of any town possessed by his

Majesty's troops, provided the master shall produce a licence, specifying the voyage, &c. and the quantity and species of provisions; but by the same proviso it is declared, that goods not licensed, found on board such ships, shall be forfeited.

(z) *Supra*, p. 253. Note (a).

(a) *B. R. M.* 32 *Geo. 2.* 2 *Burr.* 664.

which have been cited, because here there was a direct contravention of the law of the land.—As to the nonsuit, if it had been recorded, I should have set it aside, that the plaintiffs might not imagine themselves injured by the admission of their counsel.

1779.

JOHNSTON
against
SUTTON.

The rule made absolute [17].

[17] *Vide Delmada v. Motteux, B. R. M. 25 Geo. 3.*

LEE against WHITE and Others.

[256]

Tuesday,
16th Nov.

THIS cause, which was an action of trespass for taking the plaintiff's goods, was tried before HEATH, *Serjeant*, at the last Assizes for *Somersetshire*. The defendants justified under the statute of 1 & 2 *Philip and Mary*, cap. 7. (a). A verdict was found for the plaintiff, but subject to the opinion of the court on a case which stated;—That *Frome* is an ancient market-town, but not a town corporate, nor having any guild, fraternity, or liberty; that the plaintiff, at the time of seizing the goods in the declaration mentioned, did not inhabit in *Frome*, but was an inhabitant of the city of *Hereford*, carrying on the trade of a linen-draper there; and that, in the room in the declaration mentioned, in the town of *Frome*, and not in any open fair, he proffered to sell, by retail, the goods in the declaration mentioned, being part linen-cloth, part haberdashery, and the residue mercery wares, not being of his own making [1]; that two of the defendants, being constables of *Frome*, and the other defendants in their aid, entered the room, and seized and carried away the goods.

The inhabitants of one market town, city, borough, or town corporate, are not prohibited by 1 & 2 Ph. & M. c. 7. from selling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair.

Batt, for the plaintiff.—*Davenport*, for the defendants.

Batt having mentioned the case of *Davis v. Leving*, reported in *Levinz* (b), (where, upon a demurrer, it was adjudged, that the inhabitants of one market-town might sell their goods by retail in another, and were not meant to be prohibited from so doing by the statute of *Philip & Mary*.) *Davenport* admitted, that it was decisive; and the court, without argument, declared themselves to be of that opinion.

The *Posse* to be delivered to the plaintiff.

(a) § 1, 2.

[1] By § 5. of the statute, there is an exception as to the linen or woollen

cloth of the vendor's own making.

(b) *B. R. 25 Car. 2. 2 Lev. 89.*

1779.

Tuesday,
16th Nov.JANSON and Another, Assignees of BURTON,
a Bankrupt, against WILLSON.

The depositions of the act of bankruptcy, when recorded according to 5 Geo. 2. c. 30. § 41. are evidence, in an action at law, to prove the precise time when the act of bankruptcy was committed, if specified therein.

THE defendant having obtained a judgment against *Burton*, levied on his effects to the amount of his debt, on the 25th of *January* 1779. On the 25th of *February* following, a commission of bankruptcy issued against *Burton*, and he was found a bankrupt, on the evidence of *Anne Wells*, then his seryant, who swore to several acts of bankruptcy on the 7th and 8th of *January*. Before the sheriff had paid the money over to *Willson*, the assignees gave him notice not to part with it, stating to him, that an act of bankruptcy had been committed before the execution of the writ of *feri facias*. The sheriff applied for, and obtained, leave to pay the money into court, and the assignees having moved that it might be paid over to them, the court directed a feigned issue to try, "whether *Burton* became a bankrupt before the 25th "day of *January* 1779." At the trial, the plaintiffs proved, that *Anne Wells* was dead, and produced an office-copy of the record of her deposition, made according to the directions of the statute of 5 Geo. 2. c. 30. § 41. in order to shew, that *Burton* had committed an act of bankruptcy before the 25th of *January*. It was objected, at the trial, that it was not the meaning of the statute, that the depositions, when entered of record, should be evidence of the precise time of the party's becoming a bankrupt, but merely that he was so before the commission issued. Lord MANSFIELD, before whom the cause was tried at the last Sittings at *Guildhall*, admitted the evidence; and a verdict was found for the plaintiffs; but his Lordship saved the point; and the defendant, in the beginning of this term, obtained a rule to shew cause why the verdict should not be set aside.

The case came on to be argued, this day, by the Solicitor General, and *Davenport*, for the plaintiffs,—*Dunning*, and *Erskine*, for the defendant.

In support of the rule, it was argued, that the purpose of the provision for making a record of the depositions is declared, by the preamble, to be, to protect the titles of purchasers under commissions of bankrupt, which purpose is attained, if depositions so recorded are only admitted as evidence of every thing necessary to support the commission; and, for that end, proof that there was an act of bankruptcy before the commission issued, is sufficient. If the more extensive construction were received, the effect, in numberless instances, would be to overturn, instead of establish-

establishing titles under commissions. A man who has been in possession almost twenty years might lose his estate, in an ejectment, on this sort of evidence. When a commission is opened, the commissioners never inquire, or cross-examine the witness, as to the precise time of the bankruptcy, and therefore no precision on that point is to be looked for in the depositions; and Lord HARDWICKE publicly approved of that method of proceeding, and said, that the commissioners ought not to find the exact time, not thinking *that* within their province. When a statute encroaches on the general rules of law, by making *that* evidence which otherwise is not, it ought to be construed strictly, and not carried beyond the purpose for which the innovation was introduced.

On the other side, it was said, that the act of parliament was compulsory as to reading the depositions in evidence. The degree of credit a jury might chuse to give to them was another question. They might be contradicted or misbelieved. The argument from the manner in which the preamble of the clause of the statute on which the point arose was worded, could have no weight. It specifies only the inconvenience to purchasers of *messuages, lands, tenements, or hereditaments*; would it be contended, that purchasers of *personal property* could not avail themselves of the depositions, when recorded to prove their title? If those depositions are to be read in evidence, they must be taken all together, and cannot be garbled, and part considered as admissible, part not. Besides, the enacting part is general, and says, that copies of the record of depositions made up in the manner directed by the act, "shall and may be given in evidence to prove such commissions, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters or things [1]."

Lord MANSFIELD,—At the trial, I had a recollection that this question had come before the court upon some former occasion, and that Sir *Fletcher Norton* had argued it, but I did not remember the event. The objection to the evidence seemed to me to have weight, in this cause, where the only fact in issue is the *time* when the bankruptcy

1779.

JANSON
against
WILLSON.

[259]

[1] There is a remarkable inaccuracy in this section of 5 Geo. 2. c. 30. which was not mentioned on the present occasion. After prescribing the manner of entering the commission, deposition, proceedings, and certificate of record, it says, that true copies, "signed and attested as herein after mentioned," shall and may be given in evidence, but there is not in the sub-

sequent part of the clause, nor of the act, any provision for attesting or signing the entries so made. It is only enacted that the Chancellor shall appoint a person who shall by himself or his deputy, by a writing under his or their hands, enter of record such commissions, &c.—24. How the copy of the deposition in this case was attested and signed?

1779.

JANSON
against
WILLSON.

ruptcy took place. I took the safest way. I admitted the evidence, and left the jury to judge of the weight of it, but saved the point for the opinion of the court. Upon consideration, it seems clearly determined by the act of parliament itself. The witness cannot tell his story before the commissioners, without saying *when* the act of bankruptcy was committed. He must mention *that*, naturally, and of course, and therefore is the more likely to speak the truth. In many cases its being an act of bankruptcy depends on the time. The legislature considered the commissioners as indifferent persons, examining the witnesses with impartiality, and taking care of the interests of all parties. It is very common for the enacting part of a statute to extend beyond the evils mentioned in the preamble, and the *English* language does not afford more general words than those used in the enacting part of this statute. It turns out, that this very point was agitated in the case of *Alderson v. Temple* (a), and, after consideration, the court was unanimous, that the act is conclusive, and the depositions are admissible evidence to all purposes.

WILLES, and ASHBURST, *Justices*, of the same opinion.

BULLER, *Justice*,—I have a note of *Alderson v. Temple*, which mentions this point, and Mr. *Davenport* has lent me one of his, which is very accurate (b). The court, at first, were not aware of the words of the act, but afterwards, though there was no express decision, the audience were impressed with the idea that they were all clearly of the opinion just stated by his Lordship. The preamble of the act does not merely recite the inconvenience arising to purchasers under a commission, but also those to which the *creditors* of a bankrupt were exposed. What Lord HARDWICKE said has been misunderstood. He was speaking of the *adjudication* by the commissioners, not of the depositions, which must mention the time, so as to fix it after the date of the petitioning creditor's debt, and before the issuing of the commission [2]. Some acts of bankruptcy depend entirely on the time. Thus keeping house on a *Sunday* cannot make a man a bankrupt. It is unnecessary, in this case, to determine, whether the depositions might have been contradicted.

The rule discharged.

(a) *T. 8 Geo. 3. 4 Burr. 2235.* Since reported, 1 *Blackst. 660.* But this point is not mentioned by either of these reporters.

(b) *Buller, Justice*, read *Davenport's* note.

[2] The *Solicitor General* said, Lord *Hardwicke's* reason for advising commissioners to find the bankruptcy generally was, that they might allow all who were creditors prior to the date of the commission to prove their debts.

1779.

MACDOWALL *against* FRASER:Tuesday,
16th Nov.

THIS was an action upon a policy of insurance on the ship the "*Mary and Hannah*, from *New York* to "*Philadelphia*." At the time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the ship to the underwriter as follows: "The *Mary and Hannah*, a tight vessel, "failed with several armed ships, and was seen safe in the "*Delaware* on the 11th of *December*, by a ship which "arrived at *New York*." In fact, the vessel was lost on the 9th of *December*, by running against a *chevaux de frise*, placed across the river. The cause came on to be tried before Lord MANSFIELD, at the last Sittings at *Guildhall*. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. On *Monday*, the 8th of *November*, *Dunning* obtained a rule to shew cause, why there should not be a new trial, which came on to be argued this day.

The *Solicitor General*, and *Dunning*, for the plaintiff.—*Lee* and *Davenport*, for the defendant.

On the part of the plaintiff, the difference between a warranty and a representation was much enlarged upon. It was admitted, that the representation in this case was false in point of fact, though the insured, at the time, believed it to be true. It was also admitted, that a representation, if false, in a *material* point, annuls the contract. But it was contended, that the particular day when the ship had been seen in the *Delaware* was not material. That the meaning of the representation was to inform the underwriter, that the ship had got safe through two thirds of her voyage from *New York*, and beyond the reach of capture. What was stated as to that material part was perfectly true, and that was all that was necessary, as was decided in the cases on the insurance of the *Julius Caesar* (a). If the representation had been, that she had been seen on the 8th or 9th in the *Delaware*, it would have made no difference in the premium. There *might* have been circumstance which would have rendered the day material, as a great storm on the 9th or 10th; but there was nothing of that sort in this case. An intentional misrepresentation was not imputed to the insured. The manner in which the mistake arose was this [1]: The captain who had met the

In a representation that a ship was seen safe on such a day and had performed two thirds of her voyage, if it turn out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, and makes the policy void.

[261]

(a) *Pawson v. Ewer, &c. supra*,
p. 11. Note [3].

[1] This was stated from letters

written from *New York*, but which had not been produced at the trial.

1779:
 MACDOW-
 ALL
 against
 FRASER.

the ship said, that he had seen her on the fifth day after her departure from *New York*. It seems a ship is said to sail from *New York* indifferently, either when she sails from the quay at *New York*, or from *Sandy Hook*. When the captain mentioned her departure from *New York*, he was understood to mean from *Sandy Hook*, and it was known that she had sailed from thence on the 6th; but it turned out that he meant to speak of her departure from the quay, which was some days before.

For the defendant, it was argued, that the materiality of the fact misrepresented was before the jury, and that they had exercised their judgment upon it, and determined by their verdict, that it was material.

LORD MANSFIELD,—The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and, if he represent facts to the underwriter, without knowing the truth, he takes the risk upon himself [13]. But the difference between the fact as it turns out, and as represented, must be material. The case of the *Julius Caesar* was very different from this. The ship, there, was only fitting out when the insurance was made. No guns nor men were put on board. It was only said what was meant to be done, and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. But there was a positive averment, that the ship was seen in the *Delaware*, on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. [262] There was no evidence at the trial when she was seen in the *Delaware*, or in what condition; but, suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance, their being safe up to a certain day, is always considered as a very important circumstance. I am of opinion, that the representation concerning the day was material.

WILLES, *Justice*.—This is certainly only a representation; but, in an insurance on so short a voyage, it might have made a material difference whether the ship was known to be safe two days sooner or later. It ought to have been shewn, on the part of the plaintiff, that it was

not

[13] So, if the agent of the under- *Fitzherbert v. Mather*, B. R. M. 26 G.
 writer does so, his principal is liable. 3. 1 Term Rep. 12.

not material, but there was no evidence that the ship was met on the 9th, or any other day. The materiality was proper for the consideration of the jury.

ASHHURST, *Justice*,—The distinction which the court has made in the cases on the *Julius Caesar*, and some others, between a representation and a warranty, is extremely just. There is no imputation of fraud in this case; but the insured should have been more cautious. In the former cases the representation was of what was intended; here, it was of a fact, stated as having happened within the knowledge of the insured. He should have made the representation in the same words in which the intelligence is said to have been communicated to him.

BULLER, *Justice*,—We cannot say the difference of the day was not material. The safety of the ship is the most material fact of any, in cases of insurance. The plaintiff admits, that the place where she was met in safety was material. Why was not the time equally so? There was no intentional deceit, and it is perhaps unfortunate that the insured made the mistake; but I think the verdict right.

The rule discharged [O].

[O] *Vide Stewart v. Dunlop, Dom. Proc. 1785.*

PRITCHARD *against* PUGH.

Wednesday,
17th Nov.

ON Monday, the 8th of November, *Mingay* had moved, as of course, to change the venue from *Middlesex* to *Montgomeryshire*, on the usual affidavit, that the cause of action arose there. The court however expressed considerable doubts, and * only granted a rule to shew cause, which was argued on Tuesday the 17th, by *Davenport* for the plaintiff, and *Mingay* for the defendant. *Mingay* relied on the case of *Waddington v. Thelwell*, reported in *Burrow* (a). He read a manuscript note of that case lent him by *Kenyon*, who was counsel in it. There a similar rule was granted, and made absolute, but there was no opposition. The other cases cited in *Waddington v. Thelwell* were also mentioned, and BULLER, *Justice*, read several of them from manuscript notes in his possession. He said the doubt was to whom the writ of enquiry must be directed in case of judgment by default. The court desired the case to be mentioned again this day, but *Davenport* now produced an undertaking of the plaintiff to give material

It is not settled whether the court can change the venue from an English to a Welsh county.
• [263]

(a) *T. 3 Geo. 3. 4 Burr. 2450.*

1779.

MACDOW-
ALL
against
FRASER.

1779. material evidence in *Middlesex*, which rendered it unnecessary for the court to determine the question [1].

The rule discharged.

[1] In *M. 15 Geo. 3.* a similar motion came on in *C. B.* in the case of *Freeman v. Gwyn*, reported in 2 *Blackst.* 962. The rule there was made absolute, but no cause was shewn against it, so that the point is still undecided [† 73].

[† 73] *T. 22 Geo. 3.* in a cause of *Jones v. Thomas*, a rule was obtained by *Bower*, to shew cause, why the venue should not be changed into *Carmarthenshire*; *H. 24 Geo. 3.* in *Jones v. Rees*, *Le Blanc* obtained a similar rule, to change the venue into *Glamorganshire*; and *M. 25 Geo. 3.* in *Wilkins v. Williams*, a like rule was obtained by *Douglas*, for changing the venue to *Breconshire*; but the first and last never came on again, and that in *Jones v. Rees* was made absolute without opposition. A similar rule was afterwards obtained on the motion of *Caldcott* in *Hiles v. Meredith*, *B. R. T. 25 Geo. 3.*

Wednesday,
17th Nov.

AILWAY against BURROWS, Executor.

An executor cannot be sued in the court of conscience for the county of *Middlesex*.

THIS was an action brought upon an apothecary's bill, owing by the defendant's testator, in which the plaintiff had a verdict for 1*l.* 5*s.* *Peckham*, some days ago, obtained a rule to shew cause, why the defendant should have leave to suggest on the roll that he lived in *Middlesex*, and that the debt was under 40 shillings.

DAVENPORT now shewed cause, and insisted, that it could not be meant that executors should be sued in the county court of conscience. That the legislature could not intend to give to such a court an authority to enquire into the conduct of executors, and take an account of assets. That the jurisdiction is only given against persons who owe any debt to the plaintiff, and an executor is not in law considered as owing his testator's debts.

[264] *Peckham*, on the other side, observed, that, in the establishment of several courts of this sort, there is an express exception relative to testamentary questions (a), and, as there is none in the act of 23 *Geo. 2. c. 33.* [1], it was a fair inference, that no such exception was meant. That the expression of "owing" is not to be found in that act, and

(a) *Vide 3 Jac. 1. c. 15. § 6.* (cited *supra*, p. 245.) and 23 *Geo. 2. c. 30. § 20.*

[1] The only exception in this statute, when the defendant lives in *Middlesex*, and is liable to be summoned to the court, is in cases where the "judge shall certify in open court on the back of the record, that 1. the freehold,

" or 2. the title to the plaintiff's land, or 3. an act of bankruptcy, principally came in question," § 19. None are liable to be summoned but such as were so, to the old common-law county court, and the new court cannot hold plea of no action, cause, or suit except such as were within the old jurisdiction, § 4.

and is in the others (b). At any rate, the court would, (as they had done in a very late case of the same sort (c),) allow the suggestion of the fact, leaving the consequence in point of law for subsequent consideration.

Lord MANSFIELD,—The court will not permit the suggestion of a matter on the roll, unless it appear to be relevant, and it could not be meant to give this court of conscience a jurisdiction over executors. If there is no express exception, there is one implied from the nature and reason of the thing.

The rule discharged (d).

(b) As in 3 Jac. 2. c. 15. and 23 Geo. 2. c. 30.

(d) Vide *supra* Woolley v. Cloutman, p. 244, Wase v Wyburd, p. 246. and

(c) Wase v. Wyburd, *supra*, p. 246. Wiltshire v. Lloyd, *infra*, 381.

1779.

ALLWAY
against
BUR

GOODRIGHT, Lessee of DOCKING, and two Others against DUNHAM and Another.

Wednesday,
27th Nov.

THIS was an ejectment, tried before SKYNNER, Chief Baron, at the last Assizes for Norfolk, when a case was reserved for the opinion of the court, which, (as far as was material,) was as follows: *Thomas Laming*, being entitled to a remainder in fee, in the premises in question, expectant on the death of *Ann Bulver*, tenant for life, by a codicil to his will, devised them, in the following words:—"I give my messuage, &c. (describing the premises,) "to my son *Jeffery Laming* for his life, and, after his death, "unto all and every his children equally, and to their heirs, "and, in case he dies without issue, I give the said premises "unto my said two daughters and their heirs, equally to be "divided between them."—The testator died in the lifetime of *Ann Bulver*, having left the said *Jeffrey* his only son and heir at law, who, after the death of *Ann Bulver*, entered upon the premises, and suffered a recovery thereof, to the use of himself in fee, and afterwards conveyed them to the defendants. He died in 1778, without having ever had any issue. Two of the lessors of the plaintiff were the two daughters of *Thomas Laming*, mentioned in the codicil to his will, and the third was a person to whom they had, in 1776, conveyed their interest expectant on the death of their brother.

If an estate is devised,—to the testator's son for life, and after his death to the son's children and their heirs, and in case the son die without issue then to the testator's two daughter's (then in esse) and their heirs,—the estate to the children of the son and that to the daughters are both contingent remainders in fee, and a recovery by the tenant for life bars them both.

*[265]

The case was argued, on Tuesday, 16th of November, by *Le Blanc*, for the plaintiff, and *Lee*, for the defendants.

The court desired *Lee* to begin.

He argued, that, wherever a freehold estate is first limited, sufficient to support the subsequent limitations as remainders, they shall never be considered as executory devises,

Vol. I.

S

1779.
 GOODRIGHT
 against
 DUNHAM.

devises. (a). [13]. Here, the estate given to Jeffrey was for life, and the limitation to his children and their heirs was clearly a contingent remainder in fee. The remainder over must, therefore, of necessity, be contingent also, because there cannot be a vested remainder after a limitation in fee. (b). *Luddington v. Kime* (c), is so directly in point as not to be distinguishable from the present case. The devise there was to A. for life without impeachment of waste; and in case he should have any issue-male, then to such issue-male, and his heirs for ever; and if he should die without issue-male, then to B. and his heirs for ever. A. entered, suffered a common recovery, and died without issue; and it was held, that the two remainders over after A.'s life-estate were concurrent [† 74], contingent remainders in fee, and both barred by the recovery. Though it seems very clear that Jeffrey took only an estate for life, yet it will answer the purpose of the defendants equally well to consider him as having taken an estate tail, because, in that case, there can be no doubt but the recovery barred all subsequent remainders. *Doe, Lessee of Browne, v. Holme & Longmire* (d), is another case almost exactly in point. An estate was there left to the testator's son for life, with impeachment of waste, and, after his decease, unto the heirs-male or female lawfully to be begotten of the body of his said son, they paying out of the same, a sum of 400*l.* &c. which if they did not pay within a limited time, then the estate to go to his daughter and her heirs, till the said legacies should be raised out of the rents and mesne profits, and, when that should be done, to return to the heir-male or female lawfully begotten by his said son, and to his or her heirs for ever; but, if his said son should die leaving no issue, then to his said daughter, and her heirs for ever. The son entered, and suffered a recovery, and died, without ever having had any issue. The daughter, upon his death, brought an ejectment, but the court of Common Pleas held clearly, that her interest, *quâcumque viâ*, was barred, being a contingent remainder in fee limited after a prior contingent remainder in fee.

Le Blanc said, he took it to be admitted, that the estate to Jeffrey was only an estate for life, and contended, that the limitation to his children was only in tail, and therefore the remainder over, being to persons *in esse*, was vested, and, of course, not destroyed by a recovery suffered

(a) *Purfoy v. Rogers*, 2 Saund. 388.
 [13] *Wealthy, Lessee of Manley, v. Fosville*, B. R. E. 9 Geo. 2. Ca. Temp. *Ld. Hardw.* 258, 259.
 (b) *Vide* 10 Co. 85.

(c) C. B. E. 9 W. 3. 1 *Ld. Raym.* 203. 1 Salk. 224. 3 *Lev.* 431.
 [† 71] *Vide infra*, p. 505, Note.
 (d) B. B. T. 11 E. M. 12 Geo. 3. 3 *Willf.* 237. 241. Since reported, 2 *Blackst.* 777.

ferred by a mere tenant for life. At least the question was still open; for, in the two cases relied on, on the other side, the words by which the intermediate estate was limited, were different from those in the present will. In *Luddington v. Kime*, the expression "for ever" is super-added, which is a strong indication of the intent to give a fee-simple. In *Doe v. Holmes*, there is the same expression, and the estate limited is charged with the payment of a large sum of money, which is a circumstance that has always weighed considerably in questions whether the estate intended was for life, in tail, or in fee. In a will, it is not of course that the word "heirs" shall carry an estate in fee-simple. If subsequent expressions manifest an intention only to give an estate-tail, the court will lay hold of them. Now, here, the daughters were collateral heirs to their brother's children; if, therefore, the testator had meant that the estate to the brother's children should be a fee-simple, the limitation over would be nugatory, and without any meaning, because the heirs of the children could never be exhausted while the daughters of their heirs continued to exist. There are many cases of this sort, where a limitation to heirs has been restrained to heirs of the body, when the limitation over has been to a collateral heir of the person named in the prior limitation. Thus, in *Webb v. Haring* (a), the limitation was to the testator's son, and if the testator's three daughters should overlive their brother, and his heirs, then to them; and the daughters being collateral heirs to the son, the words "his heirs" were restrained to heirs of the body (1).

LORD MANSFIELD, — In that case, the court put the only possible construction on the words. The daughters could not overlive the son's collateral heirs, and therefore it was necessary there to restrain the sense. But here the words are very different; the limitation over is not "if the daughters survive the son's children and their heirs," but "if the son die without issue."

Lee, in reply, admitted the general doctrine, that subsequent words, indicating an intent to give an estate-tail, will

1779.

GOODRIGHT
against
DUNHAM.

[267]

[27] And this in the case of a grant, as well as of a will. "Come mettons que je donne terre a vous et a vos heirs a toujours en le primes del' fait, et puis je di oultre et si contingat que vous deviez sans heirs de votre corps, il remaine a un untre, en cest cas le ley entendra per le si contingat, que votre estat est estat tail." 19 Hen. 6. 74. B.

(a) B. R. H. 14 Jac. 1. Cro. Jac. 415.

[1] Vide also *Tyte v. Willis*, Ca. temp. Talb. 1. *Nottingham v. Jennings*, 1 P. Will. 23. *Parker v. Thacker*, 3 Lev. 70. *Attorney General v. Gill*, 2 P. Will. 369. *Tilburgh v. Barbeck*, 1 Vez. 89 [† 75].

[† 75] *Morgan v. Griffiths*, B. R. H. 15 Geo. 3. Cowp. 234.

1779.
 GOODRIGHT
 against
 DUNHAM.

will restrain the sense of the word "*heirs*," in a will, but insisted, that here the intention was clear the other way. He said, if the words had been, "*and if those children*" (*i. e.* of the son) "*should die without issue*," the case would have been within the rule mentioned by *Le Blanc*, and like the case of *Doe, Lessee of Barnard, & another v. Reason* (a), where, after an estate to the testator's niece for life, there was a limitation to such issue of the niece as should be living at her death, and to the *heirs* of such issue; but which was followed, not only by the words, and "*in case my niece shall die without issue of her body then living*," but also by these words, "*or in case all such issue shall die without issue*."

The court took till this day to consider, Lord MANSFIELD observing, that the case must be determined exactly in the same manner as if *Jeffrey* had had children.

His Lordship now delivered the opinion of the court, as follows:

[268]

Lord MANSFIELD,—Neither side thought it could be maintained that *Jeffrey* took an estate-tail. The words, "*and in case he dies without issue*," being tacked to the preceding clause, must mean the same thing as "*and in case he dies without children*." But, for the defendants, it was contended, that both the limitations over were contingent remainders in fee; and, for the plaintiff, that the first was a contingent remainder in tail, and the second a vested remainder in fee. None of us have a doubt but that both are contingent remainders. There are no expressions to restrain the sense of the word "*heirs*" in the limitation to *Jeffrey's* children. If *Jeffrey* had children, the testator meant to give them an estate in fee. Upon the contingency of his not having any, he meant the estate to go immediately to his daughters in fee. The word "*heirs*," in the limitation over to the daughters, certainly does not mean "*heirs of the body*," and we cannot give the same words two different senses, in different parts of the same will [1].

The *Poslea* to be delivered to the defendants [† 76].

(a) *B. R. T.* 28 & 29 *Geo.* 2. cited at large in 3 *Wils.* 244.

[1] In *Webb v. Hearing*, the word "*heirs*" did not occur in the last limitation.

[† 76] *Vide Denn, Lessee of Geering, v. Shenton, B. R. H.* 16 *Geo.* 3. *Corp.* 410. *Doe, Lessee of Hanson, v. Fylder, B. R. T.* 18 *Geo.* 3. *Corp.* 833.

SIMOND and Another *against* BOYDELL.

1779.

Wednesday,
17th Nov.

THIS action was brought against an underwriter, for a return of premium. The material part of the policy was in these words: "At and from any port or ports in Grenada to London, on any ship or ships that shall sail on or between the first of May and the first of August 1778, at eighteen guineas *per cent.* to return 8 *l.* *per cent.* if sails from any of the West Indies islands, with convoy for the voyage (a), and arrives." At the bottom there was a written declaration, that the policy was, "on sugars, (the muscovado valued at 20 *l.* *per* hoghead,) for account of L. 2, being on the first sugars which shall be shipped for that account." The ship, the *Hankey*, sailed, with convoy, within the time limited, having on board fifty-one hogheads of muscovado sugar belonging to L. 2. She arrived safe in the Downs, where the convoy left her; convoy never coming farther, and indeed seldom beyond Portsmouth. After she had parted with the convoy, she struck on a bank called the *Pan Sand*, at Margate, and eleven of the fifty-one casks of sugar were washed overboard, and the rest damaged. The ship was, afterwards, got off the bank, and proceeding up the River, arrived safe in the port of London, and was reported at the custom-house. The sugars saved were taken out at Margate, and, after undergoing a sort of cure, by a person sent from town for that purpose, they were carried to London in other vessels; and the forty hogheads being sold, produced 340 *l.* instead of 800 *l.* which was their valuation in the policy. The defendant had paid into court the value of the sugars lost, and a return of 8 *l.* *per cent.* on 340 *l.* The plaintiffs insisted, that they were entitled to have eight *per cent.* also returned on the valued price of the eleven hogheads of sugar which were lost, and on the difference between what the remaining forty hogheads produced, and their valued price. The cause was tried before Lord MANSFIELD, at Guildhall, at the Sittings after last Trinity Term (b), when a verdict was found for the plaintiffs, to the amount of their demand. On Monday the 8th of November, Bearcroft obtained a rule to shew cause, why there should not be a new trial, which was argued this day.

The Solicitor General, Dunning, and Douglas, for the plaintiffs,—Bearcroft, Lee, and Davenport, for the defendant.

For the plaintiffs, it was insisted, as at the trial, that the words "*arrives*" applied only to the arrival of the ship.

On an insurance on goods,—to be shipped on board a certain ship, to return part of the premium, "if sails with convoy and arrives,"—the arrival of the ship is what is meant, and the full return is to be made on the whole sum insured, although there should be an average loss on the goods.

[269]

(a) *Supra*, Lilly v. Ewer, H. 19 Geo.

3 P. 72.

(b) Thursday, 17th July 1779.

1779.
SIMOND
against
BOYDELL.

[270]

ship. That, in policies of this sort, the intention is, that the underwriters shall take the war risk upon themselves, but that, if the vessel is protected by convoy from *that risk*, and actually arrive, they shall then return as much of the premium as was meant to cover it. That this is more advantageous for them, than when they receive the *short* or *peace* premium, and the insured warrants a departure with convoy, and runs the hazard of captures; because, in such cases, the underwriters must pay the whole loss, for the *short* premium, if the ship sail with convoy, although she should founder as soon as she gets out of the harbour; whereas, on a policy like the present, by the addition of the condition of arriving, they keep the *long* premium, unless two events happen; 1. that of the ship sailing with convoy, 2. her arrival. The additional premium therefore of eight *per cent.* having been given upon the whole valued amount of the sixty-one hogheads, to be retained only in case the ship should not sail with convoy, or should not arrive, the whole ought, from the words, as well as meaning of the contract, to be returned, since both those events happened—(It was suggested, that, after the return of the 81. *per cent.* the underwriters would be great gainers, for that the peace premium from *Grenada* in summer, is only two, and in winter, three guineas).—It could never be meant, by the word “*arrives*,” that all the goods should arrive in a sound state, because it is impossible in so long a voyage that some proportion, greater or less, should not be lost, or damaged. The very use of the word in the singular number shewed the general understanding that it was meant to apply to the ship.

On the other side, it was contended, that the return of premium to which the plaintiffs were entitled, could, at most, only be on the sum produced by the sugars which had actually come to *London*. The words in the policy must be applied to the subject-matter of the insurance, which, in this case, was on goods, not on the ship, and therefore the condition of arrival applied to them. They had not all arrived at *London*, nor any part of them in the vessel in which they had sailed from *Grenada*; so that the defendant might here have fairly contended, that, as the second branch of the condition had not been performed, he was not liable to make any return. However, eight *per cent.* on the produce of the sugar which was actually brought to *London* had been paid into court; but if it were to be held, that the defendant must pay the valued amount of the sugars lost, and the balance between the valued price and actual produce of the sugars saved, and also return eight *per cent.* upon the whole, the insured would be gainers considerably by the loss. This would be clear upon considering

considering that, in calculating the value in a valued policy, the merchant includes the full premium of insurance. The 20*l.* at which each hoghead of sugar was valued in this case comprehended, over and above the value of the sugar, an addition at the rate of eighteen guineas *per cent.* upon that value [1]. If therefore the insured were to be paid 20*l.* for each hoghead of sugar lost, and also eight *per cent.* more, as a return of premium, they would get 8*l.* *per cent.* more by the loss of the sugar than they would have got by it if it had arrived. But this would be contrary to the nature of insurance, which is a mere contract of indemnity, not of profit.

Lord MANSFIELD, — The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate, but length of time, and a variety of discussion and decisions, have reduced it to a certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made which has not created doubts on the construction of it. Here a word or two more would have rendered the whole perfectly clear. However I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war, but war introduces hazards of another sort, depending on a variety of circumstances; some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, "If it turn out that the ship departs with convoy, I will return part of the premium." But a ship may sail with convoy and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, *that* would (a) not be a breach of the condition; but, to guard against that risk, the insured adds, in policies of the present sort, "the ship must not only sail with convoy, but she must arrive, to entitle you to the return." The words "*and arrives*" do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of

1779.

SIMOND
against
BOYDELL.

[271]

[1] The whole argument turned upon this suggestion, which was said to be founded on the acknowledged practice, but was not supported by any proof, in this case.

(a) *Vide supra*, Lillyv. Edwer, p. 72, 73.

1779.

SIMOND
against
BOYDELL.

of the goods on the arrival of the ship. The construction contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made unless *all* the goods arrived *safe*, they would have said, "if the ship arrive *with all the goods*," or "*safely with all the goods*." The total or partial loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But, as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern is, that in the events which have happened, the war-risk has been rated too high.

[272]

WILLES, and ASHHURST, *Justices*, of the same opinion. BULLER, *Justice*,—I am of the same opinion. The question is for the decision of the court, not of a jury, since it arises on the construction of a written instrument. What gives rise to an increase of the premium? The danger of capture. When that danger is diminished, the construction must be, that there shall be a proportional return of premium.

The rule discharged.

Thursday,
18th Nov.

HOTHAM and two Others *against* the EAST-INDIA COMPANY.

If one covenant with another, to do a certain act in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms may be *averred*—Freighters of ships under char-

THE ship *York*, of which two of the plaintiffs were part-owners, and the third captain, had been freighted by a charter-party between them and the *East-India Company*, on a voyage from *London* to *India* and back to *London*. On her return home, she met with a most uncommonly violent storm, off *Margate*, where she was stranded, on the first of *January* 1779, and sunk under water. By this misfortune, a great part of her cargo (being salt-petre) was lost; the principal part of what remained, which consisted chiefly of pepper, was greatly damaged by the sea-water, but was got out of the ship, by persons sent down by the *Company*, and brought to town in other vessels, where a particular process was employed, at a great expence to the *Company*, to restore it, in some degree, and render it marketable. The ship, after being in a great measure unloaded, was, with much difficulty, raised out of the water, and arrived in the port of *London*, with a small part of the cargo still remaining on board. The plaintiffs insisted, that she had arrived at her port of discharge, and had performed her

her parties with the *East India Company* are not answerable for damage, or loss, occasioned by the act of God—*Ship-damage*, in those charter-parties, means, damage from negligence, insufficiency, or bad stowage in the ship.

her voyage within the meaning of the charter-party, and that, notwithstanding the misfortune which had happened, and the loss of part, and the damage done to the rest, of the cargo, they were entitled to be paid the freight of the goods saved, and the demurrage. The defendants contended; *First*, that in the events which had happened, they were discharged from the payment of any freight, or demurrage; *Secondly*, that if they were liable for freight and demurrage, yet, by certain clauses in the charter-party, they were entitled to deduct therefrom the value of the goods lost; the loss upon those which were saved in a damaged state; and the expences they had been put to in getting those damaged goods to *London* and rendering them marketable. A common action of covenant was at first brought on the charter-party, to which the defendants pleaded; but afterwards both parties consented to try the questions in dispute between them in four different feigned issues, which were as follow:

1. Whether the plaintiffs were, or were not, entitled to any and what freight or demurrage in respect of the ship and voyage, in the charter-party mentioned?
2. Whether the plaintiffs were liable to pay or allow to the defendants any sum or sums of money in respect of the goods and merchandizes which had been shipped on board the said ship, and which had been *lost*, or not delivered to the defendants on her arrival in *England*?
3. Whether the plaintiffs were liable to pay or allow, &c. in respect of a certain quantity of pepper which had been shipped, &c. and which had been prejudiced, wet, and damaged, before the arrival of the ship at *London*?
4. Whether the plaintiffs ought to pay or make satisfaction to the defendants, for the expences they were at, in saving and bringing to *London* certain goods and merchandizes which were taken out of the ship when she was stranded, or otherwise concerning the said goods?

These issues came on to be tried, before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*.

There were two clauses in the charter-party on which the defence on the *first* issue was founded, *viz.*

1. "And, as touching the freight to be paid or allowed by the *Company*, it is agreed, and the *Company* covenant with the said part-owners, that the *Company* shall, and will, in case and upon condition that the ship performs her voyage, and arrives at *London* in safety, and the said part-owners and masters do perform the covenants on their part, and not otherwise, well and truly pay and allow the freight herein mentioned (a)."
2. "It is hereby agreed, that, in case the ship does not arrive in safety in the river *Thames*, and there make a
"right

1779.

HOTHAM
against
The EAST-
INDIA COM-
PANY.

[273]

(a) P. 8. of the printed form of the *East-India Company's* charter-parties.

1779.

HOTHAM
against
The East-
India Com-
pany.

[274]

" right delivery of the whole and entire cargo and lading on board the said ship as aforesaid, the Company shall not be liable to pay any of the sums of money herein before agreed to be paid for freight and demurrage, nor subject to any demands of the said part-owners or master on account of the said ship's earnings in freight, voyages for the Company, or on account of any other employment, any other law, usage, practice, or custom, notwithstanding (b)."

The following clause was the foundation of the defence on the second issue,

" And, if any of the homeward-bound cargo shall be lost or undelivered into the said Company's warehouses at the said ship's arrival in England, (except that no such payment shall be made if there happens an utter inevitable loss of ship and cargo, nor shall any other payment be made for such goods as shall necessarily perish or be cast into the sea for the preservation of the ship and cargo, than by an average to be borne by ship, freight, demurrage, and cargo,) the part-owners, and master, shall pay or allow to the Company the prime cost of such goods, and 30*l.* for every 100*l.* on such prime cost (c)."

On the third issue they relied on the following clauses:

1. " But, if any of the homeward-bound cargo, when delivered into the Company's warehouses in England, shall be found to be prejudiced, wet, or damaged, by any occasion or accident whatsoever, it shall be lawful for the Company to refuse such goods, and in such case the part-owners and master shall take them, and allow to the Company the sums which they are invoiced at, with charges, customs, and duties; and in such case the Company shall pay no charges or freight for the said goods so prejudiced, wet, or damaged, unless in cases of damaged pepper, which the part-owners and master are to allow the Company for at the current price of sound pepper in London, and the Company are to pay the freight and charges on such pepper as if it were not damaged (d)."

2. " But the said part-owners shall not be charged with any sum of money in respect of goods damaged on board the said ship, but such as shall by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship-damage; any thing herein-contained to the contrary hereof in anywise notwithstanding (e)."

3. A provision for paying demurrage to the owners, if the ship should be dispatched safe from the Malabar coast, and should not make the passage in a limited time; and which

(b) *Ibid.* p. 11.(c) *Ibid.* p. 4, 5.(d) *Ibid.* p. 4, 5.(e) *Ibid.* p. 13.

which adds, "and the owners shall not be responsible for any damage that may happen to the homeward-bound cargo, occasioned by such late dispatch (f)."

The jury having found for the plaintiffs on the three first issues, (*viz.* 1. That freight was to be paid for all the Company's goods delivered, and demurrage, as specified in the charter-party; 2. That the plaintiffs were not liable to pay for any goods lost, or not delivered; 3. That they were not liable to pay or allow for any loss on the pepper), and for the defendants on the last, (*viz.* That the plaintiffs were to pay to the defendants their proportion of the expences in saving the goods and merchandizes, by way of general average, as specified in the charter-party, and the whole extra expence of bringing the goods from *Margate*), a rule was obtained by the defendants to shew cause, why there should not be a new trial on all the issues found against them; and the case was argued this day, by *Lee, Davenport, Bateman, and Erskine*, for the plaintiffs, and the *Solicitor General*, and *Dunning*, for the defendants.

The counsel for the defendants relied, as to the freight and demurrage, on the strict terms of the instrument, by which it was stipulated, that neither should be paid for, unless the ship should arrive in safety in the river *Thames*, and there make a right delivery of the whole and entire cargo. If the plaintiffs had proceeded in covenant, such an arrival and such a delivery must have been averred, and was now necessary to have been proved to make out the case on the part of the plaintiffs. In a court of law, the stipulations of the deed must appear to have been exactly complied with; and, if any relaxation was to be allowed, on principles of equity, recourse must be had to a court of equity.

The same reasoning was equally applicable to the second issue.

On the third, they insisted, that "*ship-damage*" was synonymous to "*sea-damage*," and meant, damage happening at sea, in contradistinction to any injury the goods might have received before they were put on board, not merely damage at sea occasioned by insufficiency in the ship or the misconduct or negligence of the master or mariners, which was the interpretation contended for on the part of the plaintiffs. Without any stipulation, the owners and master would have been answerable to the Company for losses arising from those causes. The word "*ship-damage*," it is true, was meant to controul the general words in a preceding part of the instrument, by virtue of which the plaintiffs would otherwise have been liable if the goods had been prejudiced or damaged by any occasion or accident of any sort; but, according to the construction contended

1779.

HOTHAM

against

The EAST-INDIA COMPANY.

*[275]

1779.

HOTHAM
against
The EAST-
INDIA COM-
PANY.

contended for by the plaintiffs, this prior clause would be totally annulled by the other. The saving in case of a late departure from the *Malabar* coast, affords an additional proof that sea-hazards from weather, storm, &c. were meant. For how could a detention beyond the usual season increase the danger of damage from insufficiency in the vessel (independent of what the weather might occasion), or from misconduct in the master or the crew?

On the other side, it was insisted, that this sort of instrument ought to receive a liberal construction. The non-compliance with the letter of it, in not delivering the cargo in the river *Thames*, was owing to the act of the defendants themselves, in sending their servants on board, who took it out of the ship without any participation with the plaintiffs. This discharged them from the necessity of performing strictly that part of the contract, (as to which the case of *Sparrow v. Caruthers*, reported in *Strange (a)*, was in point), and the discharge might have been averred in an action of covenant. That, as to the goods damaged or lost, the charter-party was certainly very confused and ill digested, full of contradictions, owing to the circumstance of different clauses having been added at different times, without attention to the coherence and consistency of the whole. But it must be interpreted in a manner the most consistent with good sense, and the nature and general tendency of the whole contract. The expression of "*ship-damage*" could not be used in opposition to damage received before the goods are put on board, because the owners could never be answerable for that sort of injury, and therefore it never could have been thought necessary to introduce words to declare that they were not [1]. It must mean damage received on board the ship, and occasioned by negligence or misconduct; surely not damage arising, as in the present case, from the act of God, which no human care could prevent. If there were any doubt, the special jury who had exercised their judgment upon it were certainly most competent to determine it, no question being more exclusively fit for their consideration. The owners therefore were by that clause exempted from responsibility for any other sort of damage but ship-damage so understood, and the foregoing words "by any accident whatsoever" were thereby controuled and restrained. Then, as to the goods lost, this being the clear meaning of ship-damage, and universally so understood by persons

[277]

(a) *T. 18 Geo. 2. Str. 1236.*

[1] It was said, that the clause mentioning ship-damage was first introduced in 1759, when the *Shepherd East-Indiaman* was lost. The then *Solicitor-General* had given an opinion, that the

charter-party, as it then stood, would make the owners liable for losses by storms, and with the express design of preventing that construction, this new clause was adopted.

persons conversant with the subject, it could never be the intention of the contract, that, though the owners were not to be answerable for goods *damaged*, they were for goods *lost*, by the act of God. The strict compliance with the words on which the defendants relied as to the goods lost, was never expected. The cargoes of *Indiamen* are never delivered into the *Company's* warehouses, but only into lighters belonging to the *Company*. *Edwin v. The East India Company* (a), and *Edwards v. Child* (b), were cited.

Lord MANSFIELD, —I have no doubt, but that, if the delivery at *Margate* was, in the contemplation of the parties, substituted for a delivery at *London*, it might have been averred in an action of covenant (c), because there can be no material fact in a cause which may not be put upon record, or given in evidence on the general issue. The *Company* are not liable to any imputation. The part they took, when the calamity happened, was what humanity and justice required, and can be of no prejudice to either side. The charter-party is an old instrument, informal, and, by the introduction of different clauses, at different times, inaccurate, and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know no difference between a court of law and a court of equity [1]. A court of equity cannot *make* an agreement for the parties; it can only explain what their true meaning was; and that is also the duty of a court of law. I told the jury, that the instrument must have a liberal construction, according to the true intention, and I left the construction to them more than in common cases ought to be done, because the province of construing written instruments belongs to the court. On the point of *ship-damage* I had considerable doubts, which I stated fully to the jury. The *Company* have thought fit to bring the case before the court, but, upon hearing the argument, I am now clear that the verdict was right on all the issues. As to the first, the *Company*, by receiving part of the cargo, have waved all objections concerning the delivery [2]. The principal question is, whether the owners are to pay for the damage occasioned by the storm—the act of God; and this must be determined by the intention of the parties, and

1779.

HOTHAM
against
The EAST-
INDIA COM-
PANY.

[278]

(a) *Canc. H.* 1690. 2 *Vern.* 210.

(b) *Canc. M.* 1716. 2 *Vern.* 727.

(c) *Vide Jones v. Barkley, infra, T.*

21 *Geo.* 3. p. 684.

[1] In the case of *Edwin v. the East-India Company*, *Vernon* makes the court say, "Though the charter-party is so penned, that nothing can be recovered at law, yet the plaintiffs have

" a just demand, and ought to be relieved in equity."

[2] His Lordship had interrupted the defendants' counsel to ask, whether the *Company* could mean seriously to insist, that they were to have the use of the ship, and the goods which had been delivered, and not pay for the freight of them?

1779.
 HOTHAM
 against
 The East-
 India Com-
 pany.

and the nature of the contract. It is a charter of freight. The owners let their ships to hire, and there never was an idea that they insure the cargo against the perils of the sea. The Company stand their own insurers. Words must be construed according to the subject-matter. What are the obligations upon the owners which arise out of the fair construction of the charter-party? Why, that they shall be answerable for damage incurred by their own fault, or that of their servants, as from defects in the ship, or improper stowage; such as mixing commodities together which hurt one another, &c. If they were liable for damages occasioned by storms, they would become insurers, not freighters. Many of the difficulties which have been raised, are occasioned by the multiplicity of unnecessary words, introduced with a view to be more explicit; an effect which often arises from the same cause in acts of parliament. It seems the question had occurred in the year 1759, and the clause mentioning ship damage was introduced in order to fix the risks for which the owners were to be answerable. That clause rides over all the former part of the charter-party. As to the other point of *the goods lost*, the whole is one entire contract, and must be understood in a manner consistent with itself; and it never could be intended, that the owners should be protected from the lesser loss, and remain answerable for the greater.

WILLES, *Justice*, absent.

ASHBURST, *Justice*.—I am of the same opinion. The consideration, that the owners are not insurers, controuls every branch of the instrument. If the proviso concerning ship-damage had been wanting, there might have been some doubt; as the case stands there is none.

BULLER, *Justice*.—I am of the same opinion. There could have been no doubt on the subject of the first issue, if the parties had gone on in the usual way, by an action of covenant on the charter-party. If an act undertaken to be done is dispensed with by the other party, it is sufficient so to state it on the record; special pleading being nothing but a bare narration of facts in a legal form.

The rule discharged.

[279]

Friday,
 19th Nov.

Moss against GALLIMORE and Another.

A mortgagee,
 after giving
 notice of the
 mortgage to
 the tenant in

possession under a lease prior to the mortgage, is intitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice.—In a notice for the sale of a distress under 2 H. & M. c. 5. it is not necessary to mention when the rent became due for which the distress was made.

IN an action of trespass, which was tried before NARES, *Justice*, at the last Assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the

the opinion of the court, on a case reserved. The case stated as follows:—One *Harrison*, being seised in fee, on the 1st of *January* 1772, demised certain premises to the plaintiff for twenty years, at the rent of 40*l.* payable yearly on the 12th of *May*; and, in *May* 1772, he mortgaged the same premises, in fee, to the defendant *Mrs. Gallimore*. *Moss* continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but 28*l.* which was due on and before the month of *November* 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of *January* 1779, one *Harwar* went to the plaintiff, on behalf of *Gallimore*, shewed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that *Gallimore* made of the rent. The plaintiff told *Harwar*, that the assignees of *Harrison* had demanded it before, viz. on the 31st of *December*; but, when *Harwar* said that *Gallimore* would distrain for it if it was not paid, he said, he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of *Gallimore*, entered, and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c. by virtue of an authority, &c. for the sum of 28*l.* being rent, and arrears of rent, due to the said *Ester Gallimore*, at *Michaelmas* last past, for &c. and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of 22*l.* 2*s.*—The question stated for the opinion of the court, was, Whether, under all the circumstances, the distress could be justified?

Wood, for the plaintiff.—*Bower*, for the defendants.

Wood.—The plaintiff's case rests upon two grounds:

1. The defendant, *Gallimore*, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain.
2. The notice was irregular being for rent due at *Michaelmas*, whereas this rent was only due, and payable in *May*.—1. Before the statute of 4 *Anne*, c. 16. (a), a conveyance by the reversioner was void without the attornment of the tenant (b), which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence, that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor,

(according

1779.

Moss
against
GALLI-
MORE.

[280]

(a) § 9.

(b) *Co. Litt.* 309. a. b.

1779.

Moss
against
GALLI-
MORE.

(according to a late case (c),) is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing, in this case, can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force; the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as *Gallimore*, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It does not appear from the case, that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement, that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest.—2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of *William and Mary* (d), but it is thereby required, that notice shall be given thereof “*with the cause of taking*,” &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 *Geo. 2.* (e), does not make the defendants trespassors *ab initio*, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity.

[281]

Lord MANSFIELD observed, that the plaintiff was precluded, by the case, from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable; and BULLER, *Justice*, said, that it was not necessary by the statute of *William & Mary*, to set forth, in the notice, at what time the rent became due.

Bower,—If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and *Harwar* would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoffment and livery, or a fine or recovery and the deed declaring the uses; *Long v. Hemming* (a). Now, however,

(c) *Keech v. Hall*, *supra*, *M.* 19
Geo. 3. p. 21.

(d) 2 *W. & M.* *sess.* 1. cap. 5. § 2. 209.

(e) *Cap.* 19. § 19.

(a) 1 *Anderf.* 256. *S. C.* *Cr. El.*

1779.

Moss
against
GALLI-
MORE.

any doubts there might have been on this subject are entirely removed, by the statute of Queen Anne, the words of which are very explicit, viz. (b); "that all grants or conveyances of any manors, rents, reversions, or re-mainers, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made." The proviso in the same statute (c) which says, that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of the grant, shews, that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to the mortgagee. That may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents, by an ejectment against a tenant under a lease prior to the mortgage (d). The interest, it is said, is not stated to have been demanded; but the case states, that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said, the tenant could not decide between the mortgagor, (or, which is the same thing, his assignees,) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

[282]

The court told him it was unnecessary for him to say any thing on the other point.

LORD MANSFIELD,—I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for, the case protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. It is however, entangled with difficulties. The question is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne, attornment

(d) 4 Anne, c. 16. § 9.

§ 10.

Vol. I

(d) *White v. Hawkins*, *supra*, M.
19 Geo. 3. p. 23. Note [7].

1779.

Moss
against
GALLI-
MORE.

[283]

attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment, but there is a provision, that the tenant shall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was *paid* before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of executions it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a *simile*. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damnified, for the mortgagor can never obligate him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified, and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

ASHHURST, *Justice*.—The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent was distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered a tenant at will; but he cannot be so considered, if there be an undertenant; for there can be no such thing as an undertenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mortgagor is, therefore

1779.

MOSS
against
GALLI-
MORE.

only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

BULLER, *Justice*.—There is in this case a plea of the general issue, which is given by statute (a), but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded. But since that statute, it is never averred in a declaration in covenant, nor pleaded in an avowry, in the case of *Keech v. Hall*, referred to by Mr. Wood, the court did not consider the mortgagee as tenant at will *in all purposes*. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements. Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.

The *Posse* to be delivered to the defendants [† 77].

(a) 11 Geo. 2. c. 19. § 21.

Wright, B. R. M. 27 Geo. 3. 1 Term

[† 77] *Vide Eaton v. Jaques*, M. Rep. 378. 384.

1 Geo. 3. *infra*, 455. *Q Birch v.*

The KING against MILES.

[284]

Friday,
19th Nov.
It is a *general* rule, that the court will not grant an information for a private libel charging a particular offence, unless the prosecutor will deny the charge upon oath.

A RULE had been obtained to shew cause, why leave should not be given to file an information against the defendant, as the author of a libel, accusing the prosecutor (Mr. Sykes) of having been concerned in a monopoly in the *East Indies*, which produced a famine, and occasioned the death of 30,000 people.

Upon shewing cause, it was objected, that the prosecutor, in the affidavit on which the rule was granted, had not sworn directly, and pointedly, to his innocence of the charge, which, it was said, was universally required by the practice of the court, before an information will be granted for a libel accusing a private individual of a specific crime.

Lord MANSFIELD said, this was a *general* rule, though not *universal*, for that he recollected some instances, where, under particular circumstances, it had been dispensed with (a), but that there was nothing in this case to make it an exception to the general practice.

The rule discharged.

(a) *Vide Rex v. Bate*, E. 20 Geo. 3. 29 Geo. 3. 3 Term Rep. 388.
4, p. 387. *Q Rex v. Webber*, T.

1779:

Friday,
19th Nov.LAVABRE and Another *against* WILSON;
BIZE *against* FLETCHER;—and LAVABRE
and Another *against* WALTER.

If an insured ship quit the course described in the policy, from necessity, she must pursue such new voyage of necessity in the direct course, and in the shortest time, otherwise the underwriters will be discharged.

*[285]

THE first and last of these cases were actions on the same policy of insurance, on the *Carnatic*, a French *East Indiaman*. The first was tried at Guildhall, at the Sittings after *Easter Term* (a), and a verdict found for the plaintiffs. Afterwards, at the same Sittings (b), *Bize v. Fletcher*, which was an action upon a different policy, but on the same ship, came on to be tried; and a verdict was also found for the plaintiff in that cause, and acquiesced in. In *Trinity Term*, 19th *George III.* (c), a rule was granted to shew cause why there should not be a new trial in the case of *Lavabre v. Wilson*, which rule stood over till this term. In the mean time, at the Sittings after *Trinity Term*, 19th *George III.* (d), *Lavabre v. Walter* was tried, and a verdict having been found in that case likewise for the plaintiffs, a new trial was moved for in the beginning of this term (e), and a rule to shew cause being granted, the court directed that the last-mentioned rule, and that in *Lavabre v. Wilson*, should come on to be argued at the same time. All the three trials were before Lord MANSFIELD.

In *Lavabre v. Wilson*, and *Lavabre v. Walter*, the voyage insured was described in the following words: "At and from Port L'Orient to Pondicherry, Madras and China, and at and from thence back to the ship's port, or ports of discharge in France, with liberty to touch in the outward or homeward-bound voyage, at the Isles of France and Bourbon, and at all or any other place or places what or wheresoever." And there was this additional clause in a subsequent part of the policy, viz. "And it shall be lawful for the said ship, in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side, as on the other side of the Cape of Good Hope, without being deemed a deviation."

In *Bize v. Fletcher*, the description of the voyage insured was as follows, being nearly the same with that commonly used in insurances upon *English East-Indiamen*: "At and from L'Orient to the Isles of France and Bourbon, and to all or any ports and places where, and whatsoever, in the East-Indies, China, Persia, or elsewhere beyond

(a) Wednesday, 19th May, 1779.

(b) Monday, 31st May 1779.

(c) Monday, 7th June 1779.

(d) Friday, 16th July 1779.

(e) Tuesday, 9th November 1779.

1779.

LAVABRE
against
WILSON.

[286]

" beyond the *Cape of Good Hope*, from place to place, and
 " during the ship's stay, and trade backwards and for-
 " wards, at all ports and places, and until her safe arrival
 " back at her last port of discharge in *France*." But, at
 the same time that this policy was subscribed, there was
 a slip of paper wafered to it, and shewn to the under-
 writers, on which was written the following representa-
 tion (f): " The ship has had a complete repair, and is
 " now a fine and good vessel, three decks. *Intends to sail*
 " in *September* or *October* next (1776). Is to go to *Ma-*
 " *deira*, the *Isles of France*, *Pondicherry*, *China*, the *Isles*
 " of *France*, and *L'Orient*."

The ship did not sail till the 6th of *December* 1776, and
 did not reach *Pondicherry* till the 23d of *July* 1777. She
 continued there till the 23d of *August* following, when,
 instead of proceeding to *China*, she sailed for *Bengal*;
 where having passed the winter, and undergone very con-
 siderable repairs, she sailed from thence early in the year
 1778, (being the second ship that left the *Ganges*,) re-
 turned to *Pondicherry*, and after taking in a homeward-
 bound cargo, at that place, proceeded in her voyage back
 to *L'Orient*, but was taken in *October* in that year by the
Mentor privateer. The usual time in which the direct
 voyage between *Pondicherry* and *Bengal* is performed, is
 six or seven days, but the *Carnatic* was about six weeks in
 going to *Bengal*, and two months on the way back from
 thence to *Pondicherry*. Both going and returning, she
 either touched at, or lay off, *Madras*, *Masulipatam*, *Vish-*
napatam, and *Yanon*, and took in goods at all those places.

1. On the trial of *Lavabre v. Wilson*, it was, in the
 opening for the plaintiffs, insisted, that, under the general
 liberty given by the policy of touching at all places what-
 soever, the vessel might go to *Bengal*, which, by the ope-
 ration of those words, was as much part of the voyage, as
 if it had been expressly named. That the ship being
 there, the voyage might be abridged, and her further pro-
 gress to *China* abandoned, for that vessels insured may
 always return back from any point within the limits of the
 voyage contained in the policy. Lord MANSFIELD, how-
 ever, having intimated a clear opinion that the general
 words were, by the expressions of " in the outward, or
 homeward-bound voyage," and " in this voyage," qualified
 and restrained so as to mean " all places whatsoever in the
 usual course of the voyage to and from the places mentioned in
 the policy," this ground was immediately abandoned, and
 never farther mentioned by the counsel for the plaintiffs in
 the progress of these causes [1]. The plaintiffs rested
 their

(1) *Supra*, p. 12. Note [4]. col. 2. opinions of Dutch and French lawyers in
 [1] The plaintiffs had several opi- their favour, on this point.

1779.

LAVABRE
against
WILSON.

[287]

their case chiefly on another ground, viz. that the voyage to Bengal was adopted by necessity for the safety of the ship, upon the *bonâ fide* opinion of the captain and the rest of the officers, and of one Berard the supercargo, who had the principal management. To prove this necessity, it was sworn by Berard and four mates, that the ship had been detained longer in Europe, than at first was foreseen, and that she met with extremely bad weather on her outward passage, and at Pondicherry was so leaky, that it appeared to them, upon consultation, that she must be careened, which could only be done at Bengal, there being no other place so near as for her, in her then situation, to be able to proceed to it with safety, where that operation could be performed; for that no harbour between Pondicherry and the Ganges on one side, and Pondicherry and Bombay on the other, would admit of so large a vessel being hove down, her burthen being near 800 tons. Indeed, it turned out when they got to Bengal, that she could be repaired without careening, but this was only discovered, they said, after she was unloaded of much more of her contents than could have been done with safety in the open road of Pondicherry. All the witnesses for the plaintiffs swore that they took the resolution of going to Bengal much against their inclination, for that it would have been not only more for the advantage of the owners, but also more for their private interest as individuals, to go to China, they having prepared their own adventures for that market. Besides the circumstance of the leak, they assigned an additional reason for relinquishing the voyage to China, viz. that they had been detained so long at Pondicherry, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the China voyage with any degree of prudence or safety, and they said Bengal was the best place they could go to winter at.

The defence set up was; 1. That the ship had never sailed on the voyage insured, her destination, when she left Europe, having been for Bengal and not China; 2. That supposing her to have sailed on her voyage described in the policy, yet her going from Pondicherry to Bengal, instead of proceeding to China, was a deviation, and was not justified by necessity. In support of the first ground of defence, certain secret instructions were relied upon which were found on board the ship, and were addressed by the owners at L'Orient to Berard the supercargo, and which, though obscurely penned, gave great room to contend, either that at her departure it had been resolved to substitute Bengal for the China voyage, or, at least, that the alternative was left with Berard, to be decided one way or the other, according to certain events in India, which

events turned out in the sort of way that, according to the instructions, was to determine the voyage for *Bengal*. On the *second* ground they contended, that from the account given by the plaintiffs' own witnesses, there was no necessity for going to *Bengal*, and, that it appeared, that, instead of going directly thither, a trading voyage had been made from *Pondicherry*, which afforded a strong presumption, that trading was the object and motive; and that the leak, or lateness of the season, were only after-thoughts, and mere prettexts. They called two or three captains of *English East-Indiamen* to prove that, in the situation and at the time of year specified by the witnesses for the plaintiffs, the ship might have proceeded to *China*, or have returned to *Europe*, or might have stretched over to *Achem*, or *Malacca*, or have gone to *Ceylon*, with more propriety than to *Bengal*, for the purpose of careening, if that had been necessary. But, on these matters of opinion, the defendant's witnesses differed from one another very considerably, in several particulars.

Lord MANSFIELD told the jury; 1. That *Bengal* was certainly not within the words of the policy; But, 2. That, if they should think, that, at the time of the ship's departure from *Pondicherry*, the captain and officers were, *bonâ fide*, of opinion, that to go to *Bengal* was a matter of necessity, or what common prudence rendered their indispensable duty, and that there was no other motive for going to that place instead of *China*, they must find for the plaintiffs; for that going to any port, though out of the course of the voyage, is, in the eye of the law, no deviation, if necessary for the safety of the ship. On the other hand, if they thought the necessity set up a mere colour and pretext, and that the voyage to *Bengal* was determined upon from other motives, they must find for the defendant. But, in considering this question, they must not lay much stress on the opinions of other people, formed after the event, when the real state of the ship, and the nature of the leak, had been discovered. Men of different degrees of skill, experience, or understanding, might differ extremely in their judgment on the same subject, as they had seen by the diversity of opinions delivered by the different captains who had been examined.

2. On the trial of *Bize v. Fletcher*, the counsel for the defendant contended, that the representation accompanying the policy restrained the voyage to the limits therein specified, and brought the merits of the case to be the same as in *Lavabre v. Wilson*; and they produced some additional evidence, (particularly some letters written by the owners to their correspondents who had got the policy underwritten,) to raise a presumption, that the necessity

1779.

LAVABRE
against
WILSON.

[288]

1779.

LAVABRE
against
WILSON.

of going to *Bengal* was merely a pretence, devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord MANFIELD, in summing up to the jury in this cause, after stating very fully the difference between a representation and warranty, told them, that, if they were satisfied that the real intention at the time of the representation was to go to *China*, the plaintiff would be entitled to their verdict; for that the insured might change the intention in this case, and go to *Bengal*, and yet be protected by the policy, which clearly admitted of that voyage, and must have been understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. His Lordship then stated, and observed upon, the evidence which was given on the part of the defendant to shew that the necessity was fictitious; being (I presume) of opinion that if the jury had believed it to be so, it would have afforded a presumption that the original plan, even at the time of the representation, was to go, not to *China*, but to *Bengal*.

When the motion was made for a new trial in *Lavabre v. Wilson*, the new evidence which had been produced in *Bize v. Fletcher* was relied upon; but Lord MANSFIELD told the counsel, that, if they meant to make the discovery of new and material evidence the ground of their motion, they must lay it before the court by affidavit, that there might be an opportunity given to the other side of answering it; for that he could not, in his report of what passed on the trial of *Lavabre* and *Wilson*, state any of the evidence produced in the other cause.—Such affidavits were afterwards produced.

3. The evidence in the case of *Lavabre v. Walter*, was nearly the same as in *Bize v. Fletcher*. The secret instructions given to *Berard* had been more attentively perused, and afforded stronger reasons than they at first seemed to do, to suspect that the voyage to *Bengal* was predetermined before the departure from *L'Orient*. The plaintiffs' witnesses were much pressed on this occasion, to say, whether the lateness of the season alone was such as, independent of the leak, would have determined them to abandon the *China* voyage; and, on the other hand, whether the leak, independent of the other reason, would, in their opinion, have rendered it necessary so to do. To this they said, that they could not give a certain answer; for that, as neither of the cases had happened, they had not exercised their judgment upon them.

The counsel for the defendant insisted, that, if the lateness of the season was the sole or predominant reason for abandoning

abandoning the voyage to *China*, the insured could not justify the deviation to *Bengal*; for that, when an insured voyage is *abridged*, the ship must return back in the course insured, and cannot justify a deviation for the sake of wintering in a harbour more commodious perhaps than any to be found on that course.

Lord MANSFIELD now summed up very strongly against the plaintiffs, on the head of fraud. But, independent of that ground, he stated a new point against them, *viz.* that, if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that to *China*, still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner, and that the delay in going from *Pondicherry* to *Bengal*, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage.

The rules to shew cause why there should not be new trials in the two cases of *Lavabre v. Wilson*, and *The same v. Walter*, came on to be argued this day.

The Solicitor General, Cowper, and Douglas, for the plaintiffs.—Dunning, Lee, and Rooke, for the defendants.

For the plaintiffs it was argued, that, if it was true that there was a necessity sufficient to justify the voyage to *Bengal*, the time employed in going thither could not alter the case, as the risk had not been thereby increased, the coasting voyage really performed being free from all hazard, and it being sufficient if the ship arrived in the *Ganges* before the winter set in. At least, whether the risk had or had not been increased was a question of fact, for the consideration of the jury, and they had given their opinion, that it was not, by finding for the plaintiffs. It was unquestionable, that, under the words of the policy, it was competent to the ship to have stopped and touched at different places, within the usual course of *the voyage described*, though not mentioned by name, and a voyage *superadded by necessity* ought to be subject to the same qualifications, and entitled to the same sort of latitude as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage.

For the defendants, it was insisted, that this new point was a mere question of law, but that, in truth, it could not admit of a doubt, since it was only this, whether, upon a deviation for a justifiable purpose, that purpose may be abandoned, and the ship stop at various places for other unnecessary purposes. It was absurd to say, that protracting the time of the voyage did not increase the risk. As well might it be contended, that lengthening the distance would

1779.

LAVABRE
against
WILSON.

1779.

LAVABRE
against
WILSON.

would not increase it. *Clayton v. Simmonds (a)*, was cited, where it was held, by LEE, *Chief Justice*, "that, if a ship puts into a port not usual, or stays an unusual time it is a deviation."

LORD MANSFIELD, (after observing upon the evidence of fraud, and of an original intention, or commercial motive, for going to *Bengal*.)—If this application were upon the ground of impeaching the testimony of the plaintiffs' witnesses, whatever my private sentiments might be, after two concurrent verdicts, I should not be inclined to interpose. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the case has been ill decided. The question is, whether, without imputation on any body, circumstances have not happened to take the voyage out of the policy. A deviation from necessity must be justified, both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured. If the voyage to *Bengal* was unavoidable, where was the necessity to trade? All the ports touched at were out of the direct course, and six weeks and two months were consumed instead of six days.—The justice of the case required a different decision.

The rules made absolute [1].

(a) *Guildhall*, 11th March 1741, cited 1 *Burr.* 343.

[1] The two causes were again set down for trial, but the plaintiffs, when they were ready to be called on, submitted to the opinion of the court, and abandoned their claim against the underwriters.—*Lavabre and Company* were bankers at *Paris*, who had lent the sum which was the subject of this insurance, upon a contract *a la grosse aventure*, (that is, in the nature of re-

spondentia and *bottomree* united,) to the owners *Berard and Company*, at *L'Orient*. In this contract the voyage was described as in the policy, and I understand the plaintiffs have instituted a suit in *France* against the owners, which is still depending, on the ground of a deviation from the voyage upon which they advanced their money at the risk of losing it if the ship and goods should be lost.

[292]

Saturday,
20th Nov.

REN, Lessee of HALL, and Others, against
BULKELEY.

If a tenant
for life with
power to grant
leases in pos-
session for 21
years at the

best rent convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agree-
able to the terms thereof.

UPON an ejectment tried before Lord MANSFIELD, at the last assizes for *Surry*, a verdict was found for the plaintiff, upon which the defendant obtained a rule to shew

1779.

REN
against
BULKELEY.

shew cause, why there should not be a new trial. The case came on to be argued this day, when the facts, as reported by his Lordship, appeared to be as follow:—In 1741, by the marriage-settlement of Lord *Onslow*, the premises in question were settled upon him for life, remainder over in strict settlement, with a power to the tenant for life in possession, to make leases, for any term not exceeding twenty-one years, to take effect in possession and not in reversion, reserving the best rent that could be had without taking a fine. In 1754, Lord *Onslow*, by lease and release, conveyed all his life-estate to *Briscoe*, and his heirs, upon trust to apply the profits in the payment of an annuity of 150*l.* to *Wilson*, during the life of Lord *Onslow*, and the surplus to Lord *Onslow*. The year following he conveyed all his estate to trustees, for ninety-nine years, if he should live so long, for the payment of his debts; but with an express reservation as to all leases granted, or to be granted. Afterwards, in 1760, he made a lease of the premises in question, to *Lewin*, (then in possession as tenant at will,) for twenty-one years, which lease *Lewin*, in 1774, assigned to *Hall*, one of the lessors of the plaintiff. Lord *Onslow* died in 1776, and, in 1777, the remainderman who had come into possession on his death, conveyed to the defendant. The same rent was reserved by the lease to *Lewin*, which he had paid for several years as tenant at will, and he had, besides, covenanted for repairs.

At the trial, an attempt was made on the part of the defendant, but without success, to prove fraud in obtaining the lease for twenty-one years. The question now was, Whether the operation of the conveyance to *Briscoe* was not such as disabled Lord *Onslow* from making the subsequent lease to *Lewin*?

The *Solicitor General*, *Dunning*, *Morgan*, and *Bower*, argued in support of the rule for a new trial. They contended, 1. That, after the conveyance to *Briscoe*, it was impossible for Lord *Onslow* to grant a lease in possession, he having thereby parted with the whole of his life-interest; therefore, though, in words, the lease to *Lewin* conveyed an immediate estate, yet, in substance, it was a lease in reversion, and could not commence till after Lord *Onslow*'s death, who certainly had no authority by the power to grant such a lease. 2. That, by conveying all his estate in the premises to *Briscoe*, he had extinguished the power, as far as respected him, as effectually as if he had made a feoffment, or suffered a recovery. They cited the case of *Saville v. Blacket* (a), and *Gilbert on Uses* (b). They also suggested, that, if this lease were to be established, the decision would shake a great many titles, for that convey-

[293]

(a) *Cane. H.* 1721. 1 *P. Will.* 7778.(b) *P.* 5.

1779:
REN
against
BULKELEY.

ancers considered the grant of a life-estate in the manner in which Lord Onslow had conveyed his, as extinguishing a leasing power reserved to the tenant for life.

Lord MANSFIELD, (without hearing the other side,)— Powers came into the courts of common law with the statute of uses (c), and the construction of them, by the express direction of the statute, must be the same as in courts of equity (d). The creation, execution, and destruction of them, depend on the substantial intention and purpose of the parties. It is said, 1. That the grantor, in this case, was not in possession, and that it was necessary that he should be, to execute the power. But I think possession here meant the receipt of the rents and profits, which were applied to his use. If actual possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant (e). 2. It is contended, that, by granting away his life-estate, he extinguished the power. Certainly where the whole life-estate is conveyed away by the intention of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular charge, subject to which the rents and profits still belonged to Lord Onslow; and the lease could not prejudice the security, nor the remainder-man, for the best rent must be reserved. It would therefore be contrary to the intention of all the parties, to hold that the power was extinguished by the conveyance to *Briscoe*.

The rule discharged.

(c) 27 Hen. 8. c. 10.

(e) *Vide Goodtitle v. Funucan*, H. 21

(d) 1 Burr. 120. 2 Burr. 1146.

Geo. 3. *infra*, p. 565.

[294]

BARBER *against* FRENCH.

Saturday,
20th Nov.

In an action on a policy of insurance for an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, the plaintiff entering into a rule to account upon oath for what

ACTION on a policy of insurance, on the ship the *True Blue*, tried before BULLER, *Justice*, at the last Assizes for *Lancashire*. The counsel, at the trial, had begun to examine witnesses to prove the amount of an intricate average loss, but the Judge thought it would be impossible to adjust a complicated account of that sort at *Nisi Prius*. He therefore proposed, that a verdict should be found as for a total loss, the plaintiff entering into a rule to account upon oath to the defendant for what he might recover of the property insured. The defendant, upon this, desisted from cross-examining farther as to the particulars, value, &c. and a verdict being found as for a total loss, the rule proposed was entered into; but the defendant, being afterwards dissatisfied, moved for, and obtained a rule

oath for what part of the insured property he may recover.

a rule to shew cause why there should not be a new trial, on the ground that the evidence did not go to a total but only to an average loss. The plaintiff was a bankrupt, and it was now said, as an argument for making the rule absolute, that his assignees were not bound, and that the rule could not be enforced by attachment against them. This difficulty however was obviated by the counsel for the plaintiff stating, that the assignees would enter into any undertaking for the purpose of making the rule binding upon them. Lord MANSFIELD said, he had often known such rules made, where the account was so complicated, that it could not be taken in court, and blamed the defendant's conduct in desisting, at the trial, from the examination as to the particulars of the damage, after the proposal by the Judge, and then coming to the court for a new trial, on the ground that there was not a total loss. He said, if the plaintiff, or his assignees, should not comply with the rule by which they undertook to account, the defendant might apply to the court to stay execution.

The rule discharged.

1779.

BARBER
against
FRENCH.

BUTCHER and Another, Assignees of REVETT,
a Bankrupt, against EASTO.

[295]
Saturday,
20th Nov.

THIS was an action of *trover*, by the assignees of a bankrupt, to recover the value of goods which had been conveyed by the bankrupt to the defendant, under a bill of sale. The cause was tried before BLACKSTONE, Justice, at the last Assizes for *Suffolk*, when a verdict was found for the plaintiffs. On *Tuesday*, the 9th of *November*, *Graham* moved for a new trial, on two grounds: 1. It appeared that the debt of one of the petitioning creditors (there being six to make up the sum of 200 *l.* (a)), was on a promissory note, bearing date two years and a half before *Revett* engaged in trade, and it was contended, that the petitioning creditor's debt must be contracted while the bankrupt is actually in trade. That, if contracted previous or subsequent to his being a trader, a commission cannot be sued out upon it: 2. It was insisted, that the bill of sale was a fair, open transaction, not an act of bankruptcy in itself, and anterior in point of time to any act of bankruptcy committed by *Revett*. The rule to shew cause was granted.

A debt contracted before a man enters into trade, may be the ground of a petition for a commission of bankruptcy.—The executing a bill of sale of all a trader's stock and effects to pay certain debts, the overplus, if any, to be accounted for to himself, is an act of bankruptcy.

This day when it came on to be argued, the court desired *Graham* to begin, who abandoned the first point, Lord MANSFIELD having observed that the debt, though contracted before, continued a subsisting debt while the bankrupt

(a) 4 Geo. 2, c. 30. § 23.

1779.
BUTCHER
against
EASTO.

[296]

bankrupt was in trade (b). On the *second* point, the facts appeared, from the Judge's report, to be these: On the 19th of *February* 1779, *Revett* being arrested for a debt of 76 l. 9 s. 8 d. desired the bailiffs to carry him to *Easto's*, a creditor, whom he requested to bail him. *Easto* refused; but, *Revett* proposing to execute to him a bill of sale of all his effects, for the debt for which he was arrested, and also for his debt to him, which was 25 l. 9 s. he consented to give a bond for the 76 l. 9 s. 8 d. payable at the return of the writ. *Revett* was thereupon discharged, and, the same evening, executed a bill of sale of all his goods and effects whatsoever to *Easto*, with power to enter and sell the same, for the purpose, in the first instance, of paying the 101 l. 18 s. 8 d. and afterwards to pay the overplus, if any, to *Revett* himself. The next day, (the 20th of *February*,) *Easto* was put into possession of the effects, and continued the possession till he sold them on the 15th of *March* following. That same day, (20th *February*,) *Revett* signed an order, and, with *Easto's* consent, annexed it to the bill of sale, by which he agreed, that, beside the two debts above-mentioned, it should also stand as a security for another of 33 l. 18 s. 10 d. due to his landlord. On the same day, he committed an act of bankruptcy, by keeping house, and soon after absconded.—BLACKSTONE, *Justice*, had been of opinion, that the execution of the bill of sale, under the circumstances, was itself an act of bankruptcy.

Graham now insisted, that this was not a fraudulent conveyance within the meaning of the statute of *Jac. I.* (c). That there were none of the badges of fraud here which are mentioned in *Twyne's Case* (d); no secrecy, no collusion, nothing that could make it a fraud upon the general creditors. The assignment was only partial, for the particular purpose of paying certain debts, after which the surplus was to be accounted for to *Revett*, and, therefore this could not be considered as a conveyance of all his effects. He cited *Worsley v. Demattos* (e), *Wilson v. Day* (f), *Hague v. Rolleston* (g), *Alderson v. Temple* (b), *Russ v. Cooper* (i), and *Litton v. Barilet* (k); and endeavoured to distinguish them from this case.

LORD MANSFIELD, (without hearing the other side,)—This is a stronger case than any of the former. This bill of sale was a fraud on all the bankrupt laws. It was a conveyance

(b) *Vide Penriz v. Dainry*, B. R. 19 Car. 2. 1 Sid. 411. *Meggot v. Mills*, B. R. 9 Will. 3. 1 Ld. Raym. 286.

(c) 1 *Jac.* 1. c. 15. § 2.

(d) *M.* 44 El. 3 Co. 80. b.

(e) *H.* 31 Geo. 2. 1 Burr. 467.

(f) *T.* 32 & 33 Geo. 2. 2 Burr. 827.

(g) *H.* 8. Geo. 3. 4 Burr. 2174.

(b) *T.* 8 Geo. 3. 4 Burr. 2174.

(i) *B. R. T.* 17 Geo. 3. cited *supra*, 87.

(k) *C. B.* *H.* 10 Geo. 3. 3 Will. 47.

conveyance of all he had in the world; and for what purpose? To pay the man who had arrested him, but who had no judgment against him, and two other creditors. Why prefer the person who arrested him to other persons who had not proceeded with so much rigour? He must have had the act of bankruptcy, which he committed in twenty four hours afterwards, in contemplation, at the time. Before *Worsley v. Demattos* it had been determined, that a conveyance of all the effects is an act of bankruptcy; because it puts an end to all trading. Was it possible for this man to carry on his business after the bill of sale had swept away all his stock and effects [1]?

The rule discharged [† 78].

[1] *Vide Law v. Skinner, C. B. E.* 15 G. 3. 2 *Blackst.* 996. which was a case very similar to the present, and determined in the same manner.

[† 78] *Vide Devon v. Watts, H.* 19 Geo. 3. *supra*, p. 86. & *Hassells v. Simpson, B. R. H.* 24 Geo. 3. *supra*, p. 89. Note [† 39].

1779.
BUTCHER
against
EASTO.

[297]

MASON *against* HUNT and Another.

Tuesday,
23d Nov.

THIS was an action brought against the defendants, who were partners, as acceptors of six bills of exchange to the amount of 3200 l. Rowland Hunt, one of the defendants, happening to be in *Dominica* on the 17th of April 1778, wrote the following letter to his partner Thomas Hunt, the other defendant, in *London*:—"As our friends Vance, Caldwell, and Vance, (who were merchants in *Dominica*,) have made purchase of about 100 hogsheds of prize-tobacco, and purpose shipping them, or as many of them as they can get, by this convoy, I have agreed that, on their giving you orders for insurance on any part of the same, and sending bills of lading consigned to you in *London*, what bills of exchange they draw thereon at the rate of 80 l. per hogshhead, from 90 days to six months sight, as shall be determined, will be duly accepted and paid by you, and doubt not your punctual adherence thereto."—On the first of May following, Vance, Caldwell, and Vance, wrote to the defendants, ordering insurance upon 40 hogshheads of tobacco, 3600 l. without taking any notice of having drawn any bills. This letter was received on the 6th or 7th of July, and, in consequence thereof, Thomas Hunt got the sum mentioned insured for a premium of 303 l. On the same 1st of May, Vance, Caldwell, and Vance, wrote another letter to Thomas Hunt, apprising him, that they had drawn six bills of exchange for 3200 l. in consequence of Rowland Hunt's letter, payable to Robert Vance, and indorsed by him to the plaintiff, drawn on forty hogshheads of tobacco.

This

An agreement to accept a bill on certain conditions is discharged if the conditions are not complied with.—If there is a virtual acceptance, on consideration that goods shall be consigned to the acceptor to answer the bill, together with a policy of insurance upon them, the holder of the bill, by taking to the goods and selling them, discharges the acceptance.

1779.

MASON
against
HUNT.
[298]

This letter was received on the 10th of *July*. On the 11th, the bills arrived and were presented for acceptance, together with *Rowland Hunt's* letter of the 17th of *April*. *Thomas Hunt* refused to accept them, and, after a negotiation of two or three days, a memorandum was signed by the plaintiff, which, after stating the bills, proceeded in these words: "Whereas forty hogsheds of tobacco have been consigned to Messrs. *Thomas* and *Rowland Hunt*, on account of the above bills, and they being apprehensive that the net proceeds thereof may not be sufficient for that purpose, have refused to accept the said bills, we therefore accept the bill of lading of the said forty hogsheds of tobacco, and the policy of insurance for 3600*l.* to cover the same in case of loss (being valued in the said policy at 90*l.* per hoghead) both which we now acknowledge the receipt of, and that we will apply their net proceeds when in cash to the credit of Mr. *Robert Vance*, as far as the said proceeds will go, in part payment of the above bills. *Kender Mason* for self and late Co." The tobacco afterwards arriving was received and sold by the plaintiff, and produced only about 1400*l.* The occasion of the difference between this sum and the valued price in *Rowland Hunt's* letter did not appear.

The cause was tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, when the plaintiff insisted, that *Rowland Hunt's* letter of the 17th of *April* was a virtual acceptance of the bills, and that nothing had happened to discharge this acceptance. That he was therefore entitled, as holder of the bills, to recover the difference between their amount and the price for which the tobacco sold.—The defence was, that the latter did not amount to such virtual acceptance; but, if it did, that the memorandum had cancelled it,—There was a verdict for the defendants, and a rule for a new trial was obtained, which was argued on *Tuesday* the 16th of *November*, by *Dunning*, and *Cowper*, for the plaintiff, and the *Solicitor General*, and *Lee*, for the defendants.

In support of the verdict, it was contended: 1. That the agreement contained in the letter, on which the plaintiff relied as a virtual acceptance, was only conditional, qualified by the contingency, of tobacco of the value of 80*l.* per hoghead being consigned to the defendants. If the bills, together with the letter of the 17th of *April*, had been shewn on the Exchange, and the refusal of *Thomas Hunt* to accept them mentioned at the same time, no merchant would have taken them as bills payable by the *Hunt*. But, 2. If there had been an unqualified virtual acceptance, it would have been discharged by the subsequent transaction. The inducement to the agreement to accept was the profit of the commission. Could it be supposed, that

that it could be the meaning of the parties, that the defendants should continue bound for the difference between the produce of the tobacco, and the amount of the bills; and yet relinquish, to the plaintiff, the profit of the commission, the power of selling when he pleased, and the security of the bills of lading and insurance?

For the plaintiff, the case of *Pillans v. Van Mierop* (a) was cited, as an authority to prove, that there may be, by letters, or agreement, a virtual acceptance of a bill of exchange; which, independent of any authority, they said, was clear upon reason and principle. The letter of *Roland Hunt* was such an acceptance; and, as to the transaction which was contended to be a discharge, how could it be imagined that *Mason* had consented to take, in lieu of the whole, what was likely only to produce part of the amount of the bills, when he had an acceptance for the whole? The clear intention was, that the plaintiff should sell the tobacco to discharge the demand on the bills, as far as the produce should go, but without prejudice to either side.

The court took time to consider; and, this day, Lord MANSFIELD, after stating the facts as above set forth, delivered their opinion, as follows:

Lord MANSFIELD, — The defence at the trial was, that the tobacco was not of the stipulated value, and that the *Hunts* never meant to be in advance for the drawers. As to the first question, there is no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer [C]. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may shew such promise upon the Exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor. But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill knowing of the conditions annexed to the agreement, he takes it subject to such conditions. Here there were many things specified as the conditions of the acceptance—the insurance—bills of lading—consignment—a certain number of hogsheds to be delivered—of a certain value rated by the hogshed. On the face of the agreement, I thought, at the trial, and still incline to think, that the meaning of the parties was, that

1779.

MASON
against
HUNT.

(a) B. R. E. 5 Geo. 3. 3 Burr. 1663. W. 3. cap. 17. § 1. & 3 & 4 Ann.
[C] The parole acceptance of inland bills of exchange (as well as foreign) is good, notwithstanding 9 Geo. 3. cap. 9. § 5. *Lumley v. Palmer*, B. R. M. 8 Geo. 2. Cas. Temp. Lord Hardw. 74.
2 Str. 1001

1779.

MASON
against
HUNT,

that tobacco should be consigned which should be worth 80*l.* per hoghead. *Prize-tobacco* must, at that time, have meant *American* tobacco; and it is well known, that there is a very great difference between the value of the *American* tobacco, and what comes from the *French* islands. The difference here is immense. The produce of the tobacco consigned was only about 1400*l.* It is plain the *Hunts* never meant to be in advance, and I think so great a difference in the value such a fraud as to entitle the defendants to relief against the agreement. But, as to this, the rest of the court have doubted, chiefly because there is no evidence to shew how the decrease in the value arose; whether, from the inferiority of the quality, or the fluctuation in the market. If it arose from buying up refuse tobacco from the *French West Indies*, the fraud would be clear. But the rest of the court are extremely clear that the second instrument makes an end of the whole, and I think the grounds and reasons are unanswerable. As to that part of the case it stands thus: The *Hunts* say, "We are not bound. This is an imposition. The tobacco is of an inferior value. The letter represents it as worth 80*l.* The insurance makes it 90*l.* per hoghead, and it turns out not to be worth 40*l.*" If *Mason* had meant to say, "you are liable, and shall pay the bills," what would his conduct have been? He would have left the policy of insurance, and the bills of lading, in their hands, and sued them upon the acceptance. The temptation to accept was the commission on the consignment, and they were to have the security of the goods and the insurance. But the plaintiff undoes all this, and says, "Then I will take all from you—security, commission, &c."—This was saying, "I will stand in your place, but not so as to be answerable for more than the produce of the tobacco." It is impossible the defendants could mean to accept, without any benefit or security. We are all clear that this made an end of the agreement.

The rule discharged [† 79].

[† 79] *Vide Dingwall v. Dunster, supra, p. 247.*

The KING against JONES, alias THORNGOOD.

Wednesday,
24th Nov.

In an indictment for uttering a forged Bank-note, the words,

"purporting to be a Bank-note," mean, that the note, upon the face of it, appears to be a Bank-note, and the want of such appearance cannot be supplied, so as to support the indictment, by any representations of the party when he disposed of it.

THIS was an indictment for forgery, which was tried before Lord MANSFIELD, at the last Assizes for *Essex*. The indictment consisted of six counts. Upon the first, second,

1779.

The KING
against
JONES.

second, and fifth, (which charged an intent to defraud the Bank of England,) the prisoner was acquitted. The third set forth, that he "having in his custody a certain forged and counterfeited paper-writing purporting to be a Bank-note, the tenor of which forged and counterfeited paper-writing is as follows, viz.—No. F. 496. I promise to pay to John Wilson, Esq; or bearer, ten pounds. London, March 4th, 1776. For self and company, of my bank in England. L. 10. Entered John Jones,—feloniously disposed of and put away the said forged and counterfeited paper-writing, as and for a good and true Bank-note, well knowing the same to be forged and counterfeited, with intent to defraud James Rayner, against the form of the statute, &c." The fourth count only differed from the third, by calling it a certain forged and counterfeited note, instead of paper-writing. The sixth charged, that the prisoner did utter and publish, as true, a certain false, forged, and counterfeited paper-writing, purporting to be a promissory note for payment of money, (and then set forth the note as above,) with intent to defraud the said James Rayner.

On these counts a special verdict was found, viz. as to the third; that the paper-writing, purporting to be a Bank-note, in the said third count set forth, was not a note filled up by any of the officers of the Governor and Company of the Bank of England, or entered in any of their books, but was forged; that the prisoner well knowing it not to be a note of the Governor, &c. but to be forged, averred it to be a good Bank-note, and disposed of it as such to James Rayner, with intent to defraud him, and that Rayner took it from the prisoner, and gave him 10 l. for it, believing it to be a true Bank-note; that the Bank frequently pay Bank notes which are filled up by their officers, and entered in their books, although they happen not to be signed. The finding on the fourth count was the same, only calling it, as in the count, a note, instead of paper-writing. On the sixth, they found, that the said paper-writing, purporting to be a promissory note, &c. was not filled up, &c. and that the prisoner knowing, &c. averred it to be a good Bank-note, and uttered and published it as such, &c. as on the third count.

Fielding argued, on the part of the prosecution, that the charge and finding were sufficient to convict the prisoner. That, if a forged note is made in the form and appearance of a Bank-note (a), it purports to be one, although not signed, differing in this respect from a forged deed, which cannot be said to purport being a deed till it is signed, the signature being of the essence of that sort of instrument. That, from the finding, it appeared, that the note purported to

[302]

(a) Which this was.

1779.

The KING
against
JONES.

to be a Bank-note to the man who receives it, and the similitude is not at all necessary to constitute a forgery. He admitted, that the finding did not support the sixth count.

Mingay was of counsel for the prisoner; but Lord MANSFIELD stopped him, and said, that the representations of the prisoner to *Rayner*, after the note was made, could not alter the *purport*, which is what appears on the face of the instrument itself. Such representations might make the party guilty of a fraud or cheat [1].

The prisoner discharged.

[1] The prisoner had been indicted, and brought to trial, as for a *fraud*, before *Blackstone*, Justice, at the former Assize, but, as he entertained a doubt whether the offence was not rather a *forgery* with intent to defraud the Bank, the prisoner was acquitted

on that occasion, and the present indictment preferred. Lord Mansfield said, he thought the case clear at the trial, but that he had directed a special verdict on account of the doubt of *Blackstone*, Justice.

Monday, 29th
Nov.

JONES-against MAUNSELL.

It is not settled, whether the *herbage* and *pannage* of a forest are rateable under 43 *El. c. 2*.

THIS was an action of trespass, for taking the plaintiff's cattle, on a distress for the poor-rate. The question was, whether he was rateable under the statute of the 43d of *Eliz. cap. 2*. in respect of the *herbage* and *pannage* of part of *Rockingham* forest, called the *Lawn* of *Beddingfield*. A verdict having been found for the plaintiff, the case was argued, in *Michaelmas* Term, 19 *Geo. 3*. (a), on a rule to shew cause why there should not be a new trial, by *Hill*, Serjeant, *Wheeler*, *Green*, and *Lee*, for the plaintiff, and *Cust*, *Dunning*, and *Dayrell*, for the defendant. After the argument, the court directed, that inquiries, should be made on both sides, in order to discover whether there was any instance of such property being rated in any part of the kingdom. The result of those inquiries was that no instance could be found; and there being a difference of opinion in the court, the cause stood over for judgment till this day, when Lord MANSFIELD stated the case, and the reasons for granting a new trial, to the following effect:

[303]

LORD MANSFIELD,—This is an action of trespass. The declaration consists of two counts. The first for entering the plaintiff's close, and taking his cattle. The other for taking his cattle generally; and upon this the cause proceeded; and not guilty being pleaded, the question was, whether the *herbage* and *pannage* of the *Lawn*, part of *Rockingham* forest, is a species of property rateable to the poor. If it is, the defendant was entitled to a verdict; if not, the plaintiff. The plaintiff's interest was as occupier under

(a) *Thursday*, 19th Nov. 1779.

1779.

The King
against
JONES.

under Mr. *Hatton*, but whether as tenant, manager, or servant, did not fully appear; but it did appear that he was a person in the visible occupation of the property. Mr. *Hatton's* title was under a grant from *Queen Elizabeth*, to *Sir Christopher Hatton*, of the office of keeper of the *Lawn* and deer, and of the *herbage* and *pannage*. In the 4th Institute, *herbage* and *pannage* is thus explained. "He that hath the *herbage* or *pannage* of a park by the grant or demise of the King, or any other, cannot take any *herbage* or *pannage*, but of surplusage, over and above the competent and sufficient pasture and feeding of the game; and if the owner of the game suffer the game so to increase, as there is no surplusage, then he that hath the *herbage* and *pannage* cannot put any beast in the park." The same definition is adopted by *Sir Francis North*, in his argument in the case of *Potter v. North* (a). The form of the assessment was on the lodge and *Lawn*, but there was no question on any thing but the *herbage* and *pannage*. The cause was first tried before *BLACKSTONE, Justice*, and he inclined to think, that the property was not rateable, but the jury found for the defendant. It then came on here, on a motion for a new trial, when a great deal was said about the situation, whether parochial or not; but the court stript the case of every thing of that sort, and, without giving any opinion, directed a new trial, on the single question, whether rateable or not. On the second trial, *ASHHURST, Justice*, delivered it as his opinion to the jury, that the property was not rateable, and they found for the plaintiff. Another motion for a new trial has been made, and the question fully argued at the bar. Since the argument, there have been considerable doubts in the court, which have been the occasion that the case has stood over till now. We have long been agreed upon two propositions; viz. 1. That the uncertainty of the value is not material; that merely affects the quantity of the rate; 2. That whether the *herbage* and *pannage* is enjoyed by the grantee in fee, or by a tenant for life, years, or from year to year, or by a keeper or servant, is not material. If the property is rateable, any of those sorts of occupiers are. These two propositions lay out of the case all the particular circumstances concerning the nature of the plaintiff's occupation, and bring it to the simple question of law. Upon this we have been long divided, and we have consulted some of the other Judges, but without satisfaction. The arguments against the rateability were, that the owner or grantee of the forest might destroy the property entirely, by increasing the number of the deer. Such grantee would be rateable to the full value of the whole, for the forest is only exempted from the poor-rate

[304]

(a) *Ventr.* 383. 391.

1779.

JONES
against
MAUNSELL.

[305]

rate while in the hands of the crown. By disafforesting, the herbage and pannage might be extinguished. It is a species of property which does not lie in occupancy, and trespass or ejectment will not lie for it. There is no instance where it has been rated, though there is a great deal of this sort of property in the kingdom. The authorities on this side were *Vaughan* 188. 2 *Bulstrode* 249. *Croke, Car.* 492 (a). 1 *Levinz.* 213. On the other side of the question, the consequence from the cases concerning occupancy was denied; for, though this property might not lie in occupancy, according to the strict common-law sense of the word, it might be occupied within the meaning of the statute, of *Elizabeth*. If so, the usage would not alter the question. The case of *Rowlls v. Gell* [1] was much relied on; but it did not convince, because there the profits arose from the ownership of the soil, (whereas herbage and pannage is only a privilege,) and ejectment will lie for a mine, *Cro. Jac.* 150. (b). Another case, in 3 *Kells* 546, was more material (c). That case goes to shew, that tolls are rateable, and they do not lie in occupancy, according to the legal definition, nor can they be the subject of an ejectment. The authority of that case however was much doubted. It is a loose note, by a bad reporter, of a rule to shew cause; and it does not appear that cause was ever shewn. But the case was so apposite that, in the last vacation,

(a) *Pl.* 17.

[1] The case of *Rowlls v. Gell & Another*, was determined in this court in *E.* 16 *Geo.* 3. [† 80]. It was an action of trespass for taking lead ore; verdict for the plaintiff, and a case reserved, which stated; That the plaintiff was, (in consideration of 1590 *l.* paid to the King as a fine, lessee of all the lead mines, with the *lot* and *cope*, in the *soak* or wapentake of *Worksworth*, in *Derbyshire*, for 31 years, at 144 *l.* *per ann.*; That he was assessed to the poor for *lot* and *cope*, and having refused to pay was distrained upon; That *lot* is a duty of the 13th dish or measure of lead ore, made merchantable; *cope* 6 *d.* for every nine dishes raised at the mines; Those duties were without any risk to the plaintiff; They produced in that year 500 *l.* but varied and were uncertain in their value; All the King's subjects may dig ore in the place, and are entitled to a quarter of

a yard of ground adjoining to their work; and great quantities of land are rendered useless by working the mines; These duties had never been rated, but, in the neighbouring parish, the Duke of *Devonshire* had been rated, under the same circumstances, for 40 years; The miners, or the proprietors of mines, in the county of *Derby*, had never been rated.

BULLER, Justice, (then at the bar,) argued for the plaintiff, and *Wheeler* for the defendants.

The court held that this property was rateable, and not within the reason of the cases of the *Smelting Company v. Richardson*, *M.* 3 *Geo.* 3 *Burr.* 1341. and *Rex. v. Vandewall*, *E.* 33 *Geo.* 2. 2 *Burr.* 991.

(b) *E. R. H.* 4 *Jac.* 1. *Cony v. Kinbo.*

(c) *Corporation of Wickham v. the Mayor*, *pl.* 36.

vacation, I got an inquiry made in the country to which it relates, and I found that the toll there mentioned has been rated as far back as memory goes [2]. This confirms the note in *Keeble* very much, and shakes the opinion against the rateability. The question is of great consequence, and affects many persons, and, therefore, we are all of opinion that there should be a new trial, in order that the parties may have an opportunity of having the point settled upon a special verdict in the most solemn manner known to the constitution.

1779.
JONES
against
MAUNSELL.

The rule made absolute (d).

[2] The toll of *Putney* bridge is regularly rated in *Putney* parish, and also in *Fulham*, being valued at the same sum, (700*l.* a year,) in each. There are collectors at each end. At first there was none at the *Putney* end, and then the bridge was not assessed in *Putney*. *Ex Rex v. Aire Navigation*, *M.* 29 *Geo.* 3. 2 *Term Rep.* 660.

667. Since the last edition of this work, the gate on the *Putney* side has been taken down.

(d) *In Lord Bute v. Grindall*, *B. R. T.* 26 *Geo.* 3. 1 *Term Rep.* 338. the court were clearly of opinion, that the plaintiff as ranger of *Richmond* park, was not rateable in respect of the *herbage* and *pannage*.

BARBER *against* FLETCHER.

Monday, 29th
Nov.

THIS was an action on the same policy with *Barber v. French* (a), tried at the same time, the same rule entered into, and a similar verdict found; but here, besides the ground mentioned in that case, there was another stated, *viz.* that, since the trial, a material representation which had been made to *Shulbred* the first underwriter on the policy, and which turned out to be false, had been discovered. After the other case was disposed of, this stood over, on this point, till an affidavit of the fact should be procured from *Shulbred*.

* Cause was this day shewn, when it appeared, from *Shulbred's* affidavit, that, when he signed the policy, in *March* 1778, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all—"Which vessels are expected to leave the coast of *Africa* in *November* or "*December* 1777."—In truth, the vessel in question had sailed in *May* 1777, and *Shulbred* swore, in his affidavit, that, if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy, except *Shulbred*.

Davenport, for the defendant, insisted, that a representation to the first underwriter is considered as made to all who sign after him; and that the representation here was material, or at least such as ought to be submitted to a jury, for them to judge of its materiality.

A representation made to the first underwriter extends to all the others. A representation, that the ship is *expected* to sail from the coast of *Africa* on such a day, is not material, so as to vitiate the policy, although it should turn out, that she actually sailed six months before.

* [306]

Lord

(a) *Supra*, p. 281.

1779.

BARBER
against
FLETCHER.

Lord MANSFIELD.—It has certainly been determined, in a variety of cases, that a representation to the first underwriter extends to the others. But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself. He was acquainted with *Shulbred*, and had an opportunity of asking before the trial what had been represented to him. If therefore this evidence is *new*, it is owing to his own negligence. But the representation is not material. It was only an *expectation*, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff.

The rule discharged [*†* 81].

[*†* 81.] In the case of *Shirley v. Wilkinson*, which came on in *B. R. M.* 22 *Geo.* 3. upon a motion for a new trial, Lord Mansfield and the rest of the court were clearly of opinion, that, if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and what

he conceals shall appear material to the jury, they ought to find for the underwriter; the contract, in such case, being void, although the concealment should have been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account.

The End of MICHAELMAS TERM 20 GEORGE III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Twentieth Year of the Reign of GEORGE III.

1780.

GRINDLEY *against* HOLLOWAY:Tuesday,
25th Jan.

THIS was an action of trespass, in which, on the plea of not guilty, a verdict was found for the defendant. In the last term, *Wood* had obtained a rule to shew cause, why it should not be entered on the roll, that the defendant was a constable, and that the action was brought for what he had done in the execution of his office. By the statute of 7 Jac. 1. c. 5. (a), it is enacted, That if any action should be brought against a justice of peace, constable, &c. for any thing done by virtue or reason of his office, he may plead the general issue, and give the special matter in evidence; and, if the verdict shall pass with the defendant in such action, or the plaintiff become nonsuit, or suffer a discontinuance, in every such case, *the justices or justice, or such other judge before whom the said matter shall be tried, shall allow to the defendant his double costs.* There was no indorsement on the *Postea*, nor certificate, in this case; but, in an affidavit of the defendant, it was sworn, that the act for which he was sued, was done in the execution of his office.

To entitle a constable, &c. to double costs under 7 Jac. 1. c. 5. after a verdict for him, it must be certified, *by the judge who tried the cause*, that he was acting in the execution of his office.

Wood,

(a) Made perpetual, 21 Jac. 1. c. 12.

1780.

GRINDLEY
against
HOLLOWAY.

Wood, in support of the rule, cited *Rex v. Poland* (a), and *Devenish v. Mertins* (b), a case on this very statute, where it is said, that, when there is a verdict for the defendant, the facts entitling him to double costs are to be put upon the record by way of suggestion. He also mentioned some modern cases, which had been furnished him by the master, particularly one of *Hickman v. Goring* (c), a note of which was read by BULLER, Justice.

Howorth, for the plaintiff, insisted that it was clear, from the words of the statute, that the judge that tries the cause must certify, that the act complained of was done by the defendant in the execution of his office. The statute did not say, "such defendant shall be allowed his double costs," but "the justice or justices, &c. shall allow him," &c. Whether the defendant was or was not acting in the execution of his office, was an inference of law to be drawn from the particular facts proved, which the judge at *Nisi Prius* was able to do, but the court could not without trying the cause again. The defendant's affidavit was absurd; it was swearing to matter of law. The cases cited did not apply. In that of *Devenish v. Mertins*, the plaintiff having moved to discontinue, the court made the payment of the double costs part of the terms on which the motion was granted; and what was there said about a suggestion was foreign to the case before the court. But the point was expressly decided in a case in *Ventris* (d), where a suggestion, like that now prayed for, after a verdict for the defendant was refused, on the ground that it was the province of the judge before whom the cause was tried to allow the double costs.—He stated an affidavit, (which was read), by which, he said, it would appear, that the defendant was not acting in the execution of his office.

The rule discharged [+ 82].

(a) B. R. E. 3 Geo. 1. 1 Str. 49.

(b) B. R. E. 7 Geo. 2. 2 Str. 974.

(c) B. R. H. 15 Geo. 3.

(d) *Anon. C. B. E. 1 W. & M. 2 Vent. 45.*

[+ 82] But, where there is a special verdict, and it appears by the facts there found, that the act for which the action was brought, was done by the defendant by virtue or reason of his office, as a justice of peace, &c. the master must tax double costs, though there has been no certificate, nor allowance by the Judge who tried the cause. This was determined in the case of *Rann v. Pickins*, B. R. M. 23 Geo. 3.

Lord Mansfield, and Buller, Justice, said, upon that occasion, that, in common cases, where it does not appear, upon the record, in what capacity the defendant was acting, an allowance by the Judge is necessary, but not when it does appear on the record, that he was acting by virtue of his office; that the case of a discontinuance, provided for by the statute, shews, that the right to double costs was not meant to be confined entirely to such allowance of a Judge at *Nisi Prius*. The master being asked, said, he had no doubt, but that he ought to tax double costs.

1780.

The KING *against* the INHABITANTS of
UNDER-BARROW and BRADLEY-FIELD.Wednesday,
26th Jan.

TWO justices having removed *Thomassine Hallhead*, from the town and hamlet of *Ulverton*, in *Lancashire*, to the township or division of *Under-Barrow* and *Bradley-Field*, in *Westmoreland*, the court of quarter sessions for *Lancashire* confirmed their order, and stated the following case.

"*Thomassine Hallhead* single woman, being settled in the township of *Under-Barrow* and *Bradley-Field*, in the county of *Westmoreland*, by a derivative settlement from her father, was hired for one year, from *Whitsuntide* 1770, to *Whitsuntide* 1771, to *D. Burrow*, then an inhabitant of the said township, for the yearly wages of 18s. where she lived with him, under this hiring, till the 12th of May 1771. Her master then removed with her into the township of *Strickland Roger*, in the said county of *Westmoreland*, and she there continued seven days in the said service, (which completed the year,) and received her wages. Then she again hired herself to the same master for another year, from *Whitsuntide* 1771, to *Whitsuntide* 1772, for the wages of 25s. and, under this last hiring, she continued in *Strickland Roger*, from *Whitsuntide* 1771, till *Candlemas* following, when, by mutual consent, she quitted her service, and received her wages up to that time."

Wilson and *Wood* now shewed cause against quashing the orders. They endeavoured to distinguish the case from that of *Rex v. Crosscombe* (a), where the pauper, having been hired for a year in one parish, and having lived that year there, and received his wages, continued a quarter of a year longer, and then went with his master into another parish, and lived with him there six months, without coming to any new agreement; and the court held that he was settled in the last parish. That case, they said, was argued on the ground of there being no interruption,—no new contract,—but a continuance, and prolongation of the term of service, under the first hiring. So when there is a demise for a year, and the tenant holds over without any new bargain, he is still considered as holding under the original demise. But here the first contract was at an end, both in form and substance; there must have been a new bargain; the wages were different; and the sessions had not stated that there was *not* a chasm in point of time between

If there is a hiring for a year and service in the parish of *B*, and, before the end of the year, the servant removes with the master to the parish of *C*, serves out the year there, is hired to the same master for another year, with an increase of wages, and serves him several months longer in *C*, a settlement is gained in *C*.

[310]

(a) *M. 19 Geo. 2. 2 Str. 1240. Burr. Settl. Cases, No. 87.*

1780.

The KING
against
UNDER-
BARROW.

tween the first and second hiring. The second must be considered exactly as if there had been a change of master. The services in the two places could not be tacked together, as in the case of *Rex v. Crofcombe*, because the pauper having already a derivative settlement in *Under-Barrow*, the time she served there could not have operated so as to gain a settlement there, and therefore it ought not to be taken at all into the account.

Dunning, Chambre, and Howorth, argued on the other side. They observed, that, although, in the case of *Rex v. Crofcombe*, the circumstance of there being no new bargain was relied upon at the bar, the court did not decide upon that distinction, but, on the contrary, *LEE, Chief Justice*, mentioned several cases, in which a settlement was held to have been gained, where there was a year's service under two hirings (a), and said he could see no difference. If a chasm of an hour or two were to be admitted to have taken place in this case, between the end of the first year, and the new bargain for an increase of wages, that, they said, would not make such an interruption as to prevent a settlement. For this, they cited, *Rex v. Fifehead Magdalen* (b), where there was an interruption and absence from the master's house for above an hour; *Rex v. Ellerfield*, where the interruption was still longer, but not for a whole day [1]; and also a case from this very township of *Under-Barrow* (c).

[311] Lord MANSFIELD,—We are all very clear, that this was a continuance of the same service, with an increase of wages.

Both orders quashed.

(a) *Burr. Sett. Cases, loc. cit. p. 259.*

(b) *M. 11 Geo. 2. Burr. Sett. Cases,*

No. 37.

[1] That case was argued *H. 17 Geo. 3.* by *Lawrence* on one side, and *Mansfield, Dunning, and Kirby*, on the other. The circumstances were very nearly the same with those in *Rex v. Fifehead Magdalen*. The ground of the decision, in both, was the maxim, that there is no fraction of a day. The pauper was in the service every day in the year. If a discontinuance however short were to prevent a settlement, there could never be one gained where the year was served under two hirings, because there can be no new

hiring without some degree of interruption —

In the former case of *Rex v. Under-Barrow*, cited in this, it was attempted to overturn the doctrine in favour of settlements gained by a year's service under two hirings tacked together, as being contrary to the true sense of the words of 8 & 9 *Will. 3. c. 30.* and *Sir James Burrow*, in his report of the case, has investigated with great accuracy the history of the first decisions on this point. The court thought themselves bound by the authority of those decisions.

(c) *H. 6 Geo. 3. Burr. Sett. Cases, 1128. No. 175.*

1780.

ROBERTS and Another *against* HARTLEY.Thursday,
27th Jan.

IN an action for money had and received, which was tried before Lord MANSFIELD, at the last Sittings, at Guildhall, the case was this: Two letter of *marque* ships, one called the *Henry*, belonging to the plaintiffs, the other called the *Two Brothers*, which belonged to the defendant, had taken the *Gaston*, a *French East-India-man*, and the defendant, in the character of agent, had received the prize-money for both. The plaintiff demanded *his* share, and the defendant was willing to pay him what he, (the defendant,) said he was entitled to, after deducting 5 per cent. for commission, which he claimed as agent. The plaintiff insisted upon a larger proportion than what the defendant offered, and also refused to allow the commission, on the ground that the defendant had no authority to act as his agent. The defendant had paid into court what he admitted to be due, and the jury found a verdict for him.

If a prize is taken by two or more privateers, they are to share proportionably according to the number of men of which their respective crews consist.

Lee now moved for a rule to shew cause, why there should not be a new trial, upon two grounds. 1. Because, according to the evidence given at the trial, the plaintiff's ship had forty-five men on board, and the defendant had only allowed as if she had had forty-four. 2. Because the defendant had no claim as agent. In support of this last ground, he offered to read an affidavit of the plaintiff's denying the appointment of *Hartley* to be agent.

Lord MANSFIELD, — The parties came to trial on two questions. 1. Whether the defendant was agent? 2. What was to be the rule of division between the two joint captors? Upon the last, after a good deal of evidence from persons conversant in the distribution of prizes, it came out, and was agreed upon on both sides, on the authority of a case before me at the *Cockpit*, that, where there has been no special proportion of distribution agreed upon, the division shall be according to the number of men on board each ship. In the course of the trial it appeared that both sides had been under a mistake, as to the number of the men in the plaintiff's ship, and it was agreed that they were forty-five instead of forty-four; so that the defendant had not paid enough into court. But I was of opinion, as this was a liberal action, it would be improper to permit the plaintiffs to have a verdict for what is called a *Norfolk great*; that is, on a question which neither of the parties had come to try (a). The question on the agency was a very material part of the cause, but we

[312]

(a) *Vide Longchamp v. Kenny, supra, E. 19 Geo. 3. p. 132.*

1780.

ROBERTS
against
HARTLEY.

we cannot grant a new trial on the affidavit of the plaintiffs, who could not be examined at the trial.

The rule refused:—But it was referred to the master to take an account if any thing, and what, was due to the plaintiffs; the defendant, in the mean time, not to take out execution for his costs till further order from the court [+ 83].

[+ 83] *Vide Wemyss v. Linzee, infra, chell v. Rodney, infra, 620. Note. Cor-*
324. *Le Caux v. Eden, H. 21 Geo. 3. nu v. Blackburne, E. 21 Geo. 3. infra,*
infra, 594. Lindo v. Rodney, H. 22 641. Antho v. Fisher, T. 22 Geo. 3.
Geo. 3. infra, 613. Note [1]. Mit. infra, 649. Note [1].

Tuesday,
1st February.

COMERFORD *against* PRICE.

If an attorney is sued by original, as acceptor of a bill of exchange, he may plead his privilege in abatement in such a case, as well as in any other personal action.

ACTION, by original, against the defendant, as acceptor of a bill of exchange.—The declaration set forth, that the drawer had directed the bill of exchange to the defendant, by the name and description of Mr. William Price attorney at law.—The defendant pleaded, in abatement, that, at the time of suing out the original, he was an attorney of this court, and that, according to the immemorial custom and privileges of the court, every attorney of the court, who is sued in any personal action, ought to be sued by bill, filed and exhibited against him as being present in court, and that no attorney is compellable against his will to answer in any personal action prosecuted by original; and averred, that he had been impleaded by the said original writ against his will, and against the custom and privileges aforesaid.—The plaintiff demurred generally.

Davenport argued for the plaintiff, that, if this privilege of attorneys were to be held to extend to actions on bills of exchange, it would be productive of great inconvenience to trade, for a bill could not be filed in the vacation; and if the bill of exchange became due in the vacation, (which was the case here,) an attorney, who was an acceptor or indorsee, might set the holder at defiance for several months, so that the security would be worse than in the case of other persons, and not what the holder is entitled to by the custom of merchants. By accepting the bill, the defendant ought to be considered as having waved his privilege. When an attorney assumes a new character, as by taking upon him the office of executor or administrator, or by joining with another person in any contract, he loses this privilege, whether he is plaintiff or defendant. Here, by signing the bill of exchange, the defendant had taken upon him, in the eye of the law, the character of a merchant. He said there were no cases on the subject, but

[313]

but that he had known many instances where attorneys had submitted to arrests on original in actions upon bills of exchange, and that the point had never been disputed till now.

Bower was to have argued in support of the plea, but Lord MANSFIELD stopped him.

Lord MANSFIELD, — This case is extremely clear. A man does not make himself a merchant by drawing or accepting a bill of exchange. Here the very bill of exchange itself described the defendant as an attorney. If there are no cases, it is because the privilege cannot admit of a doubt.

BULLER, *Justice*, — It must not be taken for granted, that a bill cannot be filed in vacation. I think there has been a case before the court, since I have been on the Bench, where it was determined, that it may be done to save the statute of limitations [† 84]. As the inconvenience

[† 84] The following case has been since decided :

LANE v. WHEAT, B. R. M. 23 G. 3.

Wood had obtained a rule to shew cause, why the proceedings should not be set aside as irregular, the defendant being an attorney, and the action having been commenced by bill filed in the vacation. It appeared, that, if the plaintiff had waited till the commencement of the term, the statute of limitations would have attached.

Wood now cited, in support of the rule, *Broadwaite v. Blackerby* (a).

Wallace and *Leycester*, for the plaintiff, stated, that it was become the constant practice to file bills against attorneys, in vacation, to prevent the statute of limitations from attaching, (in which they were confirmed by the master,) and relied on what was said by BULLER, *Justice*, in *Comerford v. Price*. They also cited *Leadbeter v. Markland* (b) as applicable, in point of argument, and principle, and argued from the absurd consequences which would follow, if the rule contended for

on the other side were universally established, since, in cases where an action given by statute must be commenced within three months, it might so happen that the three months would begin and expire, before the commencement of the term.

Lord Mansfield, — Public justice is concerned in the question. The master states the practice to be to file bills against attorneys in vacation. Fictions are allowed against all the King's subjects for the furtherance, but never for the hinderance of justice. Why should an attorney be in a different situation from other persons?

ASHHURST, *Justice*, — In common cases, there is no occasion to take this course, because no time is gained by it.

BULLER, *Justice*, — The reason of the case in *Comerbach* cannot be supported, viz. that a bill filed in vacation cannot be referred either to the precedent or subsequent term. If that were true, no proceedings could go on out of term.

The rule discharged.

(a) B. R. H. 9 W. 3. 12 Mod. 163. Comb. 465. — Vide, also, a case of *Holway v. Cross*, B. R. E. 17 Geo. 2. cited by *Denison*, *Justice* in 2 Burr. 1052, where it is said, "That prisoners are considered in the same

"light with attorneys, (who are supposed to be always present in court), against whom bills cannot be filed, but in term time."

(b) C. B. H. 17 Geo. 3. 2 Blackst. 1131.

1780.

COMER-
FORD
against
PRICE.

1780.

CONFER-
FORD
against
PAICE.

nience supposed to attend this privilege in the case of bills of exchange, I do not see that there is any. Every person who takes one, ought to make it his business to inquire into the situation and circumstances of those whose names are upon it. And, with regard to the advantage of the arrest, that was originally only meant to compel an appearance; nothing farther can be done in vacation; so that by filing your bill against an attorney the first day of the term, you are as far advanced in the cause, as if he had been arrested.

Judgment for the defendant [+ 85].

[+ 85] An attorney who is arrested by *capias* on a special original out of the same court, is not entitled to his discharge on serving the sheriff with a writ of privilege, but must plead such privilege in abatement. *Crosley v. Shaw*, C. B. E. 16 Geo. 3. 2 Bl. 1085.

Tuesday,
1st February.

The KING against MORGAN and Another.

On a rule for an information, though the court may think a ground is laid out, if, under the circumstances, the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule on the defendant's undertaking so to do.

THIS was a rule to shew cause, why an information should not be filed against the two defendants, one of them for sending, the other for carrying a challenge. Upon shewing cause, the court thought there was ground for granting the information. But, under all the circumstances, were of opinion, that it would be a sufficient punishment of the defendants paid the costs; and, therefore, discharged the rule on those terms.

[315]
Monday, 7th
February.

THELLUSON against FLETCHER.

In an action on a policy on a foreign ship, when there is a stipulation that the policy shall be sufficient proof of interest, if there is judgment by default, the plaintiff on the writ of inquiry needs only to prove the defendant's subscription to the policy, without

giving any evidence of interest.

THIS was a rule to shew cause, why the inquisition on a writ of inquiry, in an action on a policy of insurance, should not be set aside. The case was this: The policy was on goods on board three French vessels, from *Saint Domingo* to *Bourdeaux*. The material part of it, as to this case, was in the following words: "On all goods loaden or to be loaden aboard the ships *Le Soigneur*, *La Pucelle*, and *Le Vanqueur*, all or any of them: The said goods and merchandizes by agreement are, and shall be valued at (a), on 25 casks of clayed sugar, and 12 hogsheds of muscovados: The policy to be deemed sufficient proof of interest

(a) This was left blank, as here printed.

"interest in case of loss." The first count in the declaration stated, that goods to a great amount, being the property of certain foreigners, had been shipped on board *Le Soigneux*, and that *she* had been lost. The second averred, that the goods were shipped on board *the three ships, or some or one of them*, to the amount of the sum insured, and that *two of them had been captured, and the other lost*. The defendant had underwritten 300*l.* and having suffered judgment by default, the jury, on the writ of inquiry, assessed the damages at that sum, without any proof of the amount or value, or any evidence whatever, except of the defendant's handwriting to the policy.

The *Solicitor General*, for the plaintiff.—*Bearcroft*, and *Davenport*, for the defendant.

It had been urged, on the part of the defendant, before the sheriff, and was now, that it was incumbent on the plaintiff to give some farther evidence of interest, and to prove that some sugars belonging to the insured had been shipped. An affidavit was produced tending to shew that, in fact, the insured had no interest.

The *Solicitor General* contended, that, by the express agreement of the parties, no other proof of interest but the policy was required, and this insurance on foreign ships and property was not within the statute prohibiting such policies (*b*), so that the plaintiff was entitled to recover the sum insured by the defendant, even if it could be proved that the insured had no property on board.

The court said, that this was not a policy within the statute, foreign ships not having been included in that act, on account of the difficulty of bringing witnesses from abroad to prove the interest. The only difficulty there could have been here was from the circumstance of there being three ships, but the second count was so framed as to make the case the same as if there had been but one. By suffering judgment, the defendant had confessed the plaintiff's title to recover, and the amount was fixed by the stipulation in the policy.

BULLER, *Justice*, observed, that writs of inquiry are often sued out in cases where they are not necessary [1], as for instance, in actions on covenants for the payment of a sum certain; and, for this, he cited a case in 2 *Saunders*.

(b) 19 *Geo.* 2. c. 37.

[1] Vide *Bruce v. Rawlins*, C. B. E. 10 *Geo.* 3. 3 *Wils.* 61, 62. where, on a motion to set aside the inquisition on a writ of inquiry for excessive damages, in an action of trespass, the Re-

porter makes *Wilmot*, Chief Justice, say, "This is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages [† 86]."

[† 86] Vide also, to the same effect, 2 *Wils.* 372, 374. *Hewit v. Mantell*, C. B. E. 8 *Geo.* 3.

1780.

THELLUS-
SON
against
FLETCHER.

[316]

1780.

THELLUS,
SON
against
FLETCHER.

Saunders (a) [O 1]. He said it does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange, or a promissory note, nothing but the instrument is to be proved before the jury [2], the sum being thereby ascertained. Though, even in cases where there is no necessity for a writ of inquiry, that proceeding is of use, when the plaintiff goes for interest, which the jury assesses in the name of damages.

The rule discharged [3].

(a) *Holdipp v. Otway*, T. 21 Car. 2. 2 *Saund.* 106.

[O 1] In *Rasbleigh v. Salmon*, C. B. T. 29 Geo. 3. H. Bl. 252. which was an action on a promissory note, and judgment by default, the court, on motion, referred it to the prothonotary to ascertain the damages and costs, and calculate interest on the note, without a writ of inquiry.

[2] In such cases, although the note or bill is stated, and the execution of it averred, in the declaration, it has

been settled in many instances, that it must be produced before the inquiry jury. *Billers v. Bowles*, C. B. H. 18 Geo. 2. *Barnes*, quarto edit. p. 233. *Ellis v. Wall*, C. B. T. 19 & 20 G. 2. *ibid.* p. 234. *Snowdon v. Thomas*, C. B. H. 11 Geo. 3. 2 *Blackst.* 748. [† 87] [O 2].

[3] There was a similar rule in another action on the same policy, (*Thellusson v. Walter*), which, of course, was also discharged.

[† 87] S. C. 3 *Will.* 155.

[O 2] But it need not be proved.

Green v. Hearn, B. R. E. 29 Geo. 3. 3 *Term Rep.* 301.

[317]

Monday, 7th
February.

WALKER and Others, Assignees of BEAN, a Bankrupt, against BURNELL and Another.

If a bankrupt after his certificate and who trades again for himself is left for several years in possession of his house, household goods, and furniture, in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors as part

of the estate, such possession does not fall within the 21 *Yor. 1. c. 19. § 11.* so as to vest the goods in assignees under a second commission.

THIS was an action of *trover*, against the sheriffs of London for goods taken on a writ of *fieri facias*. The cause was tried at the last Sittings at Guildhall (a), before Lord MANSFIELD. The facts were these:—A commission had been sued out against *Bean*, in August 1772. He had been engaged in very complicated and extensive concerns; and debts to the amount of 60,000*l.* were proved under this commission. In December 1772, he obtained a certificate. He never removed from his house, nor were the furniture, household goods, and plate, sold or removed, but he remained in possession of them, and, after his certificate, engaged in trade on his own account, and continued to trade till some time in the summer 1779, and after the execution in question. But though he traded for himself, he was continued in the house by his assignees, (the

(a) Saturday, the 18th of December 1779.

(the present plaintiffs,) as an agent for them in getting in and settling his affairs, and in all the statements of the bankrupt estate and effects, which they had laid before his creditors at different times down to *March 1779*, the household goods in question, (which had been inventoried and valued immediately after the commission issued,) were included. In *March 1779*, an action was commenced against *Bean* by two creditors, *Davis* and *Prothero*, who afterwards recovered a judgment, and sued out the *fieri facias* which gave rise to the present cause. A *distingas* having issued to compel an appearance in that action, the officer came to *Bean's* house, to levy on his goods, when *Bean* paid the 40*s*. The same attorney acted for *Bean* and for the assignees. In a note which he wrote to the attorney for *Davis* and *Prothero*, stating to him that he thought there was an irregularity in the *distingas*, and desiring him to return the 40*s*. he took no notice that the goods in the house did not belong to *Bean*. The execution came in in *June*, and, about the same time, the assignees had the goods again appraised, when they were valued at 353*l*. They then proposed that they should be sold by auction to the best bidder, and the produce paid into court, to abide the event of an action to be brought by them to try the property. The attorney for *Davis* and *Prothero* agreed to this, but the sheriff's officer would not, but removed the goods from the house, in *June*, and on the 17th of *November 1779*, sold them, under a writ of *venditioni exponas*, for 260*l*. The present action was commenced on the 11th of *November*, and two days afterwards (13th *November 1779*), a second commission issued against *Bean*. The time of the act of bankruptcy, on which this second commission was founded, did not appear. The present plaintiffs proved a debt under it. Their attorney in this cause was also solicitor to the second commission.

The defence was; 1. That, after permitting such a long possession by *Bean*, who continued the visible owner, and held forth the credit of the effects to the world while he traded on his own account, the present plaintiffs had precluded themselves from claiming them against his *bonâ fide* creditors: 2. That, if this were not so clear, yet *Bean's* possession was such as intitled the assignees under the second commission to the goods, by virtue of the statute of *Jac. 1. (a)*, and therefore, *quâcunque viâ*, the present plaintiffs could not make out a property in themselves to support their action.

The answer given on the part of the plaintiffs was: 1. That, from the extensive nature of *Bean's* former business, his creditors were extremely numerous, and, as the goods had always been stated to them as belonging to the assignees,

1780.

WALKER
against
BURNELL.

[318]

1780.

WALKER
against
BURNELL.

[319]

assignees, and that even so lately as *March* 1779, it was a matter of general notoriety, that he was not the owner: 2. As to the second commission, it did not appear that the act of bankruptcy on which it was founded had been committed before the goods were taken out of *Bean's* possession; the new assignees had not claimed them; and, besides, his case did not fall within the meaning of the statute.

Lord MANSFIELD told the jury, that this was an action in which the plaintiffs must prove property in themselves, and a conversion by the defendants. That there appeared to be strong evidence, particularly from the last statement, (in *March* 1779,) that the plaintiffs, assignees under the first commission, meant to keep up their claim to the goods. This would be an answer in any question between them and *Bean*. But the point now was, whether, as between them and strangers, they were not to be considered as having made a present of the goods to the bankrupt. The goods were chiefly of a perishable nature; the possession was not for a few days or months, but for seven years; and *Bean* having begun as a new man in 1772, his new creditors dealt with him on the faith of the appearance he made in the world. As to the other ground of defence, by an express statute, if a bankrupt shall, by the permission of the owner, have in his possession, order, and disposition, goods whereof he shall be reputed owner, &c. at the time of his bankruptcy, such goods are, by the commission and assignment, vested in the assignees as completely as the rest of his estate. They must therefore consider whether these goods were in *Bean's* possession, &c. at the time of his second bankruptcy.—If they should find for the plaintiffs, and should consider the *sheriffs*, or their officer, as the real defendants, they ought to assess the damages at the appraised value of the goods. But, if they should look upon *Davis* and *Prothero* as being, in substance, the defendants, the damages ought only to be what the goods actually produced.

The jury found for the plaintiffs, with 353*l.* damages, being the appraised value.

Bearcroft, on *Tuesday* the 25th of *January*, obtained a rule to shew cause why the verdict should not be set aside, which he moved for on both grounds above stated.

The *Solicitor General* shewed cause.

Very little was said, now, on the first ground. On the second, it was objected for the plaintiffs, (as at the trial,) that there was no proof that the second bankruptcy was prior to the execution; the only answer to which was, that the attorney for the plaintiffs was possessed of the proceedings, and as he had not produced them, it might fairly be presumed, that they would shew such a prior act of bankruptcy.

Lord

Lord MANSFIELD,—The bias of my mind, at the trial, was very much in favour of the judgment-creditor; I suspected the fairness of the second commission; but, afterwards, I was satisfied with the verdict. There has been little said, now, on the first point. On the second, I thought, that as the plaintiffs had proved a debt under the new commission, they could not question its *validity*, though they might the *time* of the act of bankruptcy. The time was not proved, but I am satisfied the case cannot be brought within the statute. What are the words? “If any persons, at the time of their becoming bankrupt, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition, as owners.” Many cases have arisen upon this act, where the party left in possession might sell, but *Bean* had not the disposition so as to sell the goods. If he had sold them, it would have been a breach of trust towards the plaintiffs. If I send my plate to a banker’s, to be sure he may dispose of it, but he has not my permission or consent so to do.

WILLES, *Justice*,—As to the first point, it was a matter fit for the determination of the jury, and I think the evidence was strong in favour of the plaintiffs. With regard to the question on the statute, the words are, “if the bankrupts take upon them the sale or disposition as owners.” *Bean* could not sell, but he was permitted to use goods as visible owner for seven years. I shall not give a decisive opinion on the point. It may come often before the court. This does not seem to me to be like the case of plate sent to a banker’s. But it would be improper to grant a new trial on the ground of the act of parliament, because it could be of no service to the defendant. It could only be granted on payment of costs, and the second assignees would be entitled to bring an action, and recover the value of the goods.

ASHHURST, *Justice*,—The statute certainly does not extend to every case of possession—Not, for instance, to the case of a ready furnished lodging. I look upon this in the very same light. *Bean* gave his *service* in settling and arranging the affairs of the estate in lieu of *rent*.

BULLER, *Justice*,—Questions of this kind have much more of fact than of law in them. The sort of possession, disposition, &c. are facts to be proved, and for the consideration of the jury. The statute says, “whereof they shall be reputed owners.” Here the bankrupt was not the reputed owner. Possession of the goods exposed for sale in a shop may be within the statute, but possession of furniture

1780.

WALKER
against
BURNELL.

[320]

1780.

furniture in a house is no more evidence of a right to that furniture, than of a right to the house.

The rule discharged [+ 87].

[+ 87] *Vide*, on the construction of *Corp.* 232. *¶* *Et vide* also *Collins* the statute of 21 Jac. 1. c. 19. § 11. *v. Forbes*, B. R. T. 29 Geo. 3. 3 Term *Mace v. Cadell*, B. R. M. 35 Geo. 3. *Rep.* 316.

[321]

Tuesday, 8th
February.

DAVIE and Another *against* STEVENS and Others.

By a devise of
the fee simple
and inheritance
to A.
and his child
or children for
ever when he
shall be 21
years of age,
but if he die
before that
time, then the
fee simple and
inheritance to
B. A. takes
only an estate-
tail.

THIS was a case sent from the court of Chancery, which stated;—That *Christopher Stevens*, being seised in fee-simple of the estate in question, devised the same in the following manner:—"I also give and bequeath to my son *William Stevens*, when he shall accomplish the full age of twenty-one years, the fee-simple and inheritance of *Lower Shelfstone*, to him and his child or children for ever. I also give and bequeath to my wife *Elizabeth Stevens* my estate of *Lower Shelfstone* until my son *William Stevens* shall accomplish his full age of twenty-one, she paying to my said son, the sum of 5*l.* a year before he shall be of the age of twenty-one, and then to have the possession of the whole estate of *Lower Shelfstone*;"—(Then a particular provision for his wife;—"Also my will is, that my wife *Elizabeth Stevens* shall find and provide for my son *William Stevens*, before he shall be of the age of twenty-one, sufficient meat, drink, washing, apparel, and attendance; neither shall there be any of the timber on the estate of *Lower Shelfstone* cut or felled down, except what shall be wanting to be used on the same, before my son *William Stevens* shall be of the age of twenty-one; and then to have quiet possession of the same. But if my son *William Stevens* shall happen to die before he shall accomplish the full age of twenty-one, then I give and bequeath the fee-simple, and inheritance of *Lower Shelfstone* to my wife *Elizabeth Stevens* for ever."—The testator died, leaving *Elizabeth Stevens* his widow, and *William Stevens* his only son, who was then about fifteen, and afterwards attained the age of twenty-one, and was married, and had several children. *William Stevens* afterwards died, leaving *Mary Stevens*, (one of the defendants,) his widow, and *John Stevens*, (another defendant,) his heir at law.—The question was, what estate *William Stevens* took under the will.

(The bill was filed against the heir at law, for a specific performance of an agreement entered into by *William*, for a sale of the estate.)

Rooke, for the plaintiffs, contended, that, by the manifest intention, and upon the fair construction of the will, the

1780.

DAVIE
against
STEVENS.

the son took an estate in fee. The testator had used the strongest words possible, except "*heirs*," and *that* is not necessary to pass a fee-simple by will. In *Coke Littleton* (a), it is laid down, that an estate in fee-simple passes by a devise to a man *for ever*, or *in fee-simple*, or *to him and his assigns for ever*; and, in the case of *Widlake v. Hardinge*, in *Hobart* (b), a devise "to my cousin A. H. for 99 years, and my said cousin A. H. shall have my inheritance, if the law will allow it," was held to pass the fee-simple. Here the words "*fee-simple*," "*inheritance*," and "*for ever*," are all used. The will further says, that, at the age of twenty-one, the son should have the *whole* estate, and this would clearly carry the absolute property and inheritance, according to what is laid down in the *Countess of Bridgewater's Case* (c); but the last clause in the will is decisive, for, by *that*, if the son should die before twenty-one, the testator gives the *fee-simple* and *inheritance* of *Lower Shelsstone* to his wife *for ever*. This must mean the same fee-simple and inheritance, which, in the event of the son's coming of age, he had before limited to him. There is no devise over if the son should attain his age of twenty-one; but, if an estate-tail had only been meant, it is clear the wife was so much an object of the testator's favour that he would have limited the remainder in fee to her, and not have left it to go in a course of descent. The presumption is, in general, against a partial intestacy. It must be argued, on the other side, that the words "*child or children*" restrain the preceding words, and confine the estate to a fee-tail. Cases will be cited in support of this construction; but all that can be mentioned, were cases where the question was, whether there should be an estate in fee-simple, or for life. No case can be produced where expressions, which otherwise would clearly carry a fee-simple, have been restrained by the words "*child or children*," to an estate-tail.

Batt, for the defendants, said, he should rely on two clear rules of construction. 1. That the intention must prevail if consistent with law. 2. That effect must be given to all the words of the will, if possible. The words "*fee-simple and inheritance*" may very fairly be understood as descriptive of the interest the testator had *himself* in the estate. But if they are taken to apply to the *interest devised*, they are restrained by what follows. It was in *Wild's Case* (d) laid down, that an estate-tail passes by a devise to a man and his children, if he have no children at the time; (otherwise, as was the case there, the father only takes for life.) This doctrine is also recognized in *Cook v.*

[323]

Cook

(a) *Co. Litt.* 9. b.(d) *B. R. H.* 41 *El.* 5 *Co.* 16. b.(b) *H. 8 Jac.* 1. *Hob.* 2.

17. a.

(c) *B. R. H.* 2 *Ann.* 6 *Mod.* 106. 110.

1780.

DAVIE
against
STEVENS.

Cook in *Vernon* (e), and in *Gilbert's law of Devises*. Unless the words "*child or children*" should be construed to restrain the interest devised to an estate-tail, they will have no operation, and, according to the second rule mentioned, they must, if possible, have some effect given to them. There are numerous authorities to shew that subsequent expressions may narrow the sense of those which go before, not only in wills, but in deeds. Thus, in *Coke Littleton* (f), it is laid down, that if lands are given to *B.* and his heirs, *habendum* to *B.* and his heirs *if he have heirs of his body*, and, if he die without heirs of his body, to revert to the donor, this is only an estate-tail. So in *Leigh v. Brace*, in *Carthew* (g), a feoffment being to feoffees and their heirs to the use of *A.* for life, and afterwards to the use of *B.* and *his heirs for ever*, and for default of issue of the body of *B.* then to the use of the heirs of the feoffor, the limitation to *B.* was construed to be only an estate-tail; and, in a case in *Dyer* (h), a devise in words very like the present, viz. "I give the fee-simple of my bigger house to *A.* and after *A's* decease to *B.* *A's* son," was construed to pass only a life-estate to *A.* The words "*then to have the possession of the whole estate*," in the present case, were only meant to express that the son was, at his age of twenty-one years, to come into the possession of every thing which his mother was to possess till that time. There are no words super-added to the devise over of "the fee-simple" and inheritance" to the wife, which shows that a difference was intended between the estate given to her, if the son should die under age, and that limited to him.

Rooke, in reply, observed, that the devise was of "the fee-simple," and not "my fee-simple," which showed, that a description of the interest, not the subject, was meant. That no cases had been cited where the words, "*child or children*" had narrowed an estate to a fee-tail. In the case put in *Wild's Case* there were no words of inheritance in the first part of the devise. The case in *Dyer*, when taken all together, made rather in favour of the plaintiffs.

[324]

LORD MANSFIELD,—I had a mind to see whether ingenuity could raise a doubt, on the one side, or supply an argument, on the other, to make the case plainer than it is on the face of it. If the testator had used the words, "all his estate," "inheritance," or "for ever," and had stopped there, the fee-simple would have passed. But the words, "*child or children*," are to the full as restrictive as if he had said, "and if my son die without heirs of his body." To give the father an estate in fee, would be to strike those words out of the will. They must operate

(e) *Canc. E.* 1706. 2 *Vern.* 545.(f) *Co. Littl.* 21. a. 2. *Bac. Abr.* 260, 261.(g) *B. R. H.* 6 *Will.* 3. *Carth.* 343.(h) *E.* 16 *El. Dy.* 357. pl. 44.

to give him an estate-tail; for there were no children born at the time, to take an immediate estate by purchase. The meaning is the same, as if the expression had been, "to *William and his heirs, that is to say, his children or his issue.*" The words, "for ever," make no difference, for *William's* issue might last for ever.

The certificate was as follows:

"Having heard counsel, and considered this case, we are of opinion, that *William Stevens* took, (under the above will of *Christopher Stevens*,) an estate-tail to him and the heirs of his body, with reversion to himself in fee, by descent.

"MANSFIELD.

"WILLES.

12th February 1780.

"W. H. ASHHURST.

"F. BULLER [† 88]."

[† 88] Vide *Hodges v. Middleton*, T. 20 Geo. 3. *infra*, 415.

WEMYS *against* LINZEE and Another.

Tuesday, 8th February.

THIS was an action for money had and received to the plaintiff's use. The plaintiff was a captain of marines, (with the rank of major,) and commanded the detachment of marines on board the *Europe*, Admiral *Montague's* ship, at *Newfoundland*. Hostilities having commenced between France and this country, the Admiral sent Commodore *Evans* to seize the two French settlements of *Miquelon* and *St. Pierre*, and some marines were draughted from the *Europe*, and other ships, and sent on board the *Pallas*, under the command of the plaintiff, to assist in the expedition. The two islands being reduced, Commodore *Evans* rejoined the Admiral at *St. John's*, having left the *Surprise*, a frigate of 28 guns, commanded by captain *Linzee*, (brother to one of the defendants,) to finish some necessary business, and also the plaintiff, with part of the marines which he had brought with him from the *Europe* and other ships. The complement of marines belonging to the *Surprise* was under the command of a lieutenant *Moriarty*. Captain *Linzee*, soon after, received orders from Admiral *Montague*, to proceed, as soon as the business for which he was left was accomplished, to *St. John's*, taking the plaintiff and the marines left with him on board, and entering them on a supernumerary list for victuals only; and, in case the Admiral should have sailed for *England* when he should get to *St. John's*, then to continue the plaintiff and the marines on his supernumerary list for victuals only, till he should arrive in *England*. The Admiral having been ordered home, the *Surprise* followed, having the lieutenant and her

A captain of marines, who happens to be on board a man of war when the takes a prize but does not belong to her complement, shares only as a passenger.

[325]

1780.

DAVIE
against
STEVENS.

1780.

WEMYS
against
LINZEE.

her own complement of marines on board, and also the plaintiff and his additional marines. On the way to *England*, she took a *French* merchantman, called *Les Deux Freres*, and having brought her to *Spithead*, and the two defendants being appointed agents, they sold the ship, made out a list, according to the established regulation for the distribution of prize money, and gave notice in the *Gazette* for the payment of such part of the produce as had come to their hands. At the beginning of the war, it is usual to pass an act of parliament, authorizing the King to order the distribution of the value of prizes to the officers, seamen, marines, and soldiers, on board the ship or ships by which the prize was taken, in such proportions, and after such manner, as he should, by proclamation, order and direct. Such an act had passed on the present rupture with *France* (i), and a proclamation was issued, in the usual form, dividing the persons entitled to share in prizes into five classes, and fixing a certain proportion for each class. The descriptions of the second and fifth classes are as follow:—*Second Class*—"The captain of marines and land forces, sea lieutenants, and master on board."—They are to have one eighth divided amongst them.—*Fifth Class*—"The trumpeter, quarter gunners, carpenters, crew, steward's cook, armourer, steward's mates, cook's mate, gunsmith, swabber, ordinary seamen, and marines, and other soldiers, and all other persons doing duty and assisting on board."—This class is to have two eighths divided amongst them.—Upon the advertisement in the *Gazette*, the plaintiff came and claimed a share, when the defendants offered him the proportion of persons in the *fifth* class. He insisted he was entitled to be ranked in the *second*, as a captain of marines on board at the time of the capture, and to be paid accordingly. This being refused, he brought the present action, which came on to be tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last term (k).

The question turned very much on the nature of the marine service. Every passenger who is accidentally on board a King's ship during an engagement does duty, and is therefore entitled to share in the *fifth* class; but it was said, on the part of the plaintiff, that being an officer of superior rank to the lieutenant of marines who belonged to the *Surprise*, he superseded him of course, when he came on board, and was therefore, at the time of the capture, to be considered as commanding the marines.

Several officers in the marines were called to establish this position, but their evidence went rather to matter of opinion, than to instances, or facts; and it was suggested, on the part of the defendants, (and, in the further progress of the cause, appeared to be true,) that, by the present regulations

(i) 19 Geo. 3. c. 67.

(k) Wednesday. 22d Dec. 1769.

regulations of the navy, no officer of marines, above a lieutenant and his party, can be allotted to any ship under 50 guns. It appeared, that the complement of marines belonging to any ship is not fixed and appropriated to that ship in the same manner that the sea officers and marines are, but that they are frequently shifted and removed, in a sort of rotation, as land troops from different barracks and quarters.

For the defendants, the manner in which the plaintiff was entered on the books was relied on, as well as the above regulation against any higher officer of marines than a lieutenant, serving on board such ships as the *Surprise*. Several officers of very high rank in the navy were examined, (among others Admirals *Montague*, *Barrington*, *Evans*, and *Campbell*,) but who also spoke chiefly to their opinion, which was clear against the claim of the plaintiff, and that a superior officer of marines, coming on board by accident, does not command the complement belonging to the ship.

What was of most weight was the case of the sea officers belonging to the *Gloucester*, upon Lord *Anson's* expedition, which was shortly this: Lord *Anson*, on his return home, having the *Centurion* and *Gloucester* with him, found it adviseable to sink the *Gloucester*, taking her crew and officers on board the *Centurion*. The men were incorporated with those of that ship, but she having her full number of officers, the officers of the *Gloucester* were entered on a supernumerary list. They continued in this manner on board during the rest of the voyage, and, when the *Acapulca* ship was taken, they took a part in the engagement, (as indeed they had done all along in the business of the ship,) according to their respective ranks. When the prize-money came to be distributed, they claimed to share with the officers belonging to the *Centurion*, each according to his respective rank. This produced a suit in the Admiralty, which, in the first instance, was decided in their favour; but, upon an appeal, (in which Lord *MANSFIELD* was counsel,) the sentence was reversed, and it was determined, that they were only entitled to share in the fifth class. (The regulation for distribution being the same then as now.)

Lord *MANSFIELD*, in summing up to the jury, observed, that, if it had not been agreed to try the question by this action, there might be a difficulty for want of proper parties.—(The *Solicitor General*, though nominally for the agents, said he was not counsel for them, but for the lieutenants of the *Surprise*).—His Lordship said, the question was of a delicate nature, as the discipline on board his Majesty's ships was necessarily involved in it. In the case of the officers of the *Gloucester*, he said, the determination had

1780.

WENY'S
against
LINZEE.

[327]

1780.

WEMYS
against
LINZEE.

[328]

had been, that the words, "*on board*" in the description of the second class, meant *belonging to the ship*, and that being *corporally on board* was not sufficient. He had always thought *that* case was a very hard one, but it was solemnly decided. Opinions were not evidence, and as to facts, the proof was extremely loose on both sides. It was a material circumstance for the plaintiff, that marines are not like seamen, fixed to the particular ship; but the argument from thence, was in a great measure answered by what had further been sworn, *viz.* that only the complement sent by the Admiralty are entered as belonging to the ship, that no body can add to that complement, so that other marine officers, or men, if they come on board, are only entered for victuals as passengers. It did not appear that the plaintiff was under any orders to continue on board the *Surprise*, or that he might not have quitted her at pleasure, if he had found it more convenient to return to *England* in any other vessel. His Lordship seemed of opinion with the defendants; but the jury, after going out for some time, found a verdict for the plaintiff.

On *Tuesday* the 27th of *January*, the *Solicitor General* obtained a rule to shew cause, why there should not be a new trial, which was granted, upon his undertaking to produce an affidavit of Lord *Amberst* to shew that he and his brother, being on board a King's ship, (the *Dublin*,) on their way from *England* to *America* in the last war, a prize was taken, in which they only shared in the fifth class. An affidavit to that purpose was accordingly produced, and another, stating the order of the Admiralty, (above referred to,) that no captain of marines shall serve on board any ship under 50 guns.

This day, Lord MANSFIELD reported the evidence, to the effect above stated, and cause was shewn against the new trial.

Dunning, and *Erskine*, for the plaintiff.—The *Solicitor General*, *Davenport*, and *Taylor*, for the defendants.

For the plaintiff, it was said, that Lord *Amberst's* affidavit only proved that he and General *Amberst*, had not thought it an object to insist upon sharing in a higher class, and the order of the Admiralty could not affect the case of a captain who happened *in fact*, to be on board a smaller vessel. That the case of the *Gloucester* did not apply, for that a sea officer's existence, as such, depends on the ship to which he belongs, and if she is sunk or otherwise lost, his rank ceases intirely, till he receives a new appointment. That, if the doctrine contended for by the defendants were to prevail, an officer of marines could never receive any prize money, unless he happened to be on board his own ship, and the marines, being under the command of the Admiral, it would be in his power, by

shifting

shifting the captains, to prevent them from ever receiving a share in any prizes.

Lord MANSFIELD said, the question was of considerable public consequence, and that farther enquiry might throw light upon it. He, therefore, thought it should be sent back to a jury, without the prejudice of any opinion,

The rule made absolute [1].

[1] The new trial came on at *Guildhall*, before Lord Mansfield, on Monday the 29th of May, and the defendants having given evidence of instances in which officers, under the same circumstances with the plaintiff, had only

shared in the fifth class, and having proved that he had not in fact acted as commanding the marines on board the *Surprise*, a verdict was found for the defendants [† 89].

[† 89] *Vide Mackenzie v. Mayler, B. R. M. 25 Geo. 3.*

POLYBLANK *against* HAWKINS.

[329]

Wednesday,
9th Feb.

THIS was an action of covenant, against the assignee of a lease, by the husband of the heir at law of the original lessor. The declaration, in stating the plaintiff's title, set forth, That one *William Strobbridge* was seized in his demesne as of fee, and being so seized, granted the lease on which the action was brought. That he afterwards became seized of the reversion in his demesne as of fee, and upon his death, the said reversion descended and came to *Joanna* then and still the wife of the plaintiff, as grand-daughter and heiress at law of the said *William*; whereupon the plaintiff became, and from thence till the expiration of the term was, seized of the said reversion in his demesne as of freehold in right of the said *Joanna* his wife.—To this declaration, the defendant demurred, and assigned for cause of demurrer, “ that it is stated in the said declaration, that the said plaintiff was seized of the reversion of the said demised premises in his demesne as of freehold in right of *Joanna* his wife; whereas it ought to have been alleged, that the plaintiff and *Joanna* his wife, in right of the said *Joanna*, were seized in their demesne as of fee, of and in the said demised premises.”

In an action of covenant by the husband of tenant in fee, he must declare on a seisin in fee in himself, and his wife, in right of his wife. If he state that he is seized in his demesne as of freehold in right of his wife, it will be bad on a special demurrer.

Lawrence, in support of the demurrer, contended that the declaration must set forth some certain, determinate estate, which was not done in this case, for “ freehold” would apply either to an estate in fee, in tail, or for life, and it would be impossible here for the defendant to traverse the plaintiff's title; *Sanders v. Hussy* (1). The very estate which the party has, and by virtue of which he entitles himself to the action, ought to be stated. Here the

(1) C. B. T. 8 Will. 3. Carth. 9. 2 Lutw. 1231.

1780.

POLYBLANK
against
HAWKINS.

[330]

the allegation implies a *sole* seisin, but when an estate in fee comes to a feme-covert, the interest of the husband and wife is a seisin in fee *in both*, in right of the wife. So it is stated in the declaration in *Took v. Glascock* (m); and that it is necessary so to state it, was directly determined in *Catlin v. Milner* (n).

Wood, for the plaintiff, admitted, that the usual form of declaring was in the manner contended for, but said, such particularity was only necessary, where, in order to support the action, *the whole estate* must appear. Here an estate for life in the reversion would entitle the plaintiff to the action, and the word "*freehold*" implied that he was at least tenant for life. *That* part of the declaration which was objected to, could not be traversed; it was mere legal inference. The facts traversable were the seisin of the wife's ancestor, and the descent to her; and *that* was all that was necessary to be stated; the rest was surplusage. In the case of *Catlin v. Milner*, the husband, in a plea in bar, had merely stated, that he was seised in fee in right of his wife. That certainly was not true, and nothing farther appeared on the plea; so that it was a substantive allegation on which issue might have been taken; but here enough appeared, taking the whole of the facts stated together, to shew exactly the title of the plaintiff. The case of *Took v. Glascock* was merely the precedent of a declaration, this point was no part of the case brought before the court; and the case of *Sanders v. Hussy* was not like the present, for, there, the declaration merely said, that the plaintiff was *seised*, without any additional words.

Lord MANSFIELD absent.

WILLES, *Justice*.—This is a good objection in point of form, upon a special demurrer.

BULLER, *Justice*.—It is admitted, that it is the established practice to state the exact title, and it is a fault in form to have departed from it.

The court were going to give judgment for the defendant, but *Wood* moved for leave to amend, which was granted, on payment of costs.

(m) B. R. E. 21 Car. 2. 1 Saund.
250. 253.

(n) C. B. T. 7 Will. 3. 2 Lutw.
1421. 1425.

Wednesday,
9th Feb.

Bail to the action are not liable beyond the sum sworn to, and the costs.

JACKSON against HASSELL.

THE defendant's bail to the action obtained a rule to shew cause, why the proceedings against them, upon their recognizance, should not be stayed, on payment of the debt sworn to, and the costs.

Cause

Cause was now shewn, and it was insisted, that the bail are liable for the sum recovered by the verdict, though exceeding that for which the defendant was held to bail; but the court said, that the contrary was the settled practice.

Lord MANSFIELD absent.

Baldwin in support of the rule,—Bolton, Serjeant, for the plaintiff.

The rule made absolute [✓].

[✓] *S. P. Peterkin v. Sampson, B. double the sum sworn to. Mitchell v. R. M. 25 Geo. 3. Sheddon v. Carnes, Gibbons, C. B. M. 29 Geo. 3. H. Bl. B. R. E. 29 Geo. 3. But bail to the 76. So the sheriff on an attachment for not bringing in the body, is liable to the whole debt and costs. Forster v. Mackintosh, C. B. E. 29 Geo. 3. H. Bl. 233.*

The KING against the INHABITANTS of NORTH SHIELDS.

[331]

Friday, 11th Feb.

BY an order of a justice of peace, the parish officers of the township of *North Shields* were directed to pay to *Ann Irwin* of that township, the wife of *Thomas Irwin*, a mariner, and then a prisoner in *France*, the sum of two shillings and sixpence weekly, until such time as they should be otherwise ordered, for the support of her three children by her said husband; one aged six years, one three, and one fourteen months. The parish officers appealed to the quarter sessions, where the order was confirmed, and a special case stated to the following effect: "There was at the time of making the order, within the township, a poor-house, established according to the statute of 9 Geo. 1. c. 7. into which the parish officers were willing to receive the pauper, with her three children, and offered so to do; but she refused to go with her said three children, who were of the ages mentioned in the order. She had another child of eight years of age, for whom she did not seek relief; neither did she seek relief for herself, nor was any order for her. Her husband was a mariner and prisoner in *France*, (as stated in the order,) and the pauper unable to provide for her said three children."—The case concluded, "That these children being nurse-children, the opinion of the court was, that they ought not to be separated from their mother, and that the mother, not seeking relief herself, was not compellable to go into the work-house."

No appeal lies from an order for the relief of a pauper.—It is not settled whether a person who applies to the parish for relief for one of his children but not for himself, is entitled to such relief, although he refuses to go into the work-house.

Upon

1780:
The KING
against
NORTH
SHIELDS.

[332]

Upon a *certiorari*, and a rule to shew cause why both orders should not be quashed, the case came on to be argued, on *Wednesday*, the 9th of *February*.

Lee, and *Scott*, in support of the rule.—They argued, that the intention of the statute of 9 *Geo. 1. c. 7. § 4.* was to secure to parishes a benefit from the labour of persons asking relief. If parents receive assistance for the maintenance of their children, *that is*, in truth, a relief to them. The case, therefore, states improperly, that the wife had not asked relief for herself; she did *virtually*, by asking it for her children, whom she, if able, was bound to maintain. They relied on the case of *Rex v. Carlisle (a)*, as in point. That was an indictment against parish-officers for disobeying an order of the quarter sessions, directing the payment of one shilling *per week* towards the maintenance of a pauper and her two bastard children. The trial came on at the assizes, but the point being saved, all the judges held, that the order was void under the 4th section of the statute, which says, "That if any poor person shall refuse to be lodged, kept, or maintained, in any work-house erected according to the provisions of the act, such person shall be put out of the book or books where the names of the persons who ought to receive collection in the parish are to be registered, and shall not be entitled to ask or receive collection or relief from the church-wardens or overseers of the poor of the parish."

Dunning, on the other side, contended, that, as the mother had not asked relief for herself, and the order was only for the support of her children, the case was not within the clause of the statute relied on by the counsel on the other side. As to the children, she was willing to let them go into the work-house, and, though nurse-children cannot be separated by any compulsory order from their mother, she may, by her consent, permit the separation, if she thinks it for their advantage. In the case of *Rex v. Carlisle*, the relief asked, and granted by the order, was partly *personal*, and therefore it was distinguishable from this case, and within the statute.

Lord MANSFIELD was not present during the first part of the argument.

WILLES, *Justice*, said this was a humane order, and he wished to support it. He did not think the words of the act in the way, and inclined to adopt the distinction made at the bar between this case and *Rex v. Carlisle*.

ASHHURST *Justice*, thought the act extended to the present case; That maintenance for the children was relief to the mother. There might be great inconvenience if the court were to adopt the other construction. One

object

(a) *M. 7 Geo. 3. 3 Burn's Justice*, 13th edition, p. 537.

object of the statute was to encourage industry, by holding out the disgrace of going into a work-house, and if parents could obtain a maintenance for their children without being compellable to go to the work-house, idleness would be thereby promoted among artificers and manufacturers.

BULLER, *Justice*, on the contrary, thought the distinction between this case and *Rex v. Carlisle* clear. The act was meant in case of parishes, but the effect would be quite the reverse if, when *one* of a numerous family wants relief, the *whole* must go to the parish workhouse. On the other hand, the parish was not entitled to the labour of a *whole* family, because *one* of them might want relief.

The case stood over till this day, WILLES, *Justice*, expressing a wish that it might be compromised.

He now delivered the judgment of the court.

WILLES, *Justice*.—We think it unnecessary to give an opinion on the question which has been argued in this case [1], because I, and my two brothers, are satisfied that no appeal lies from an order of maintenance. The statute of 3 *Will. & Mar. c. 11. § 11.* gives a *concurrent* jurisdiction, in the making orders for the relief of the poor, to the justices in or out of sessions [1], and does not authorise an appeal. The act of 9 *Geo. 1. c. 7.* made no alteration in this respect. The reason for not giving an appeal is, that the pauper might starve while the cause was in suspense. We have spoken to several gentlemen very conversant with sessions law, and none of them ever heard of such an appeal [2].

The order of the sessions *quashed* [3], and the original order *confirmed*.

[1] But in *Rex v. Haigh, E. 30 Geo. 3.* it has been determined, that a parent is entitled to relief for his child, without being obliged to go into the work-house. 3 *Term Rep.* 637.

[2] The words of the statute are, "By authority of one justice residing within the parish, or (if none be there dwelling), in the parts next adjoining, or by order of the justices in sessions." This, it should seem, must mean by order of the court of quarter sessions, not of justices, as individuals, when they happen to meet at the quarter sessions. *Qu.* therefore, con-

cerning the case of *Rex v. Winslip & Grunwell, M. 11 Geo. 3. 5 Burr.* 2677. where the court is stated to have held, that the sessions could *not* make an original order of maintenance.

[3] *Vide Rex v. Woodsterton, M. 6 Geo. 2.* There was, in that case, an appeal from an order of two justices for relief, and the case coming before the court of *B. R.* the appellate jurisdiction of the sessions does not seem to have been disputed. The book indeed where it is reported is not of much authority. 2 *Barnardiston* 207. 247.

[3] Because they had no jurisdiction.

1780.

The KING
against
NORTH
SHIELDS.

[333]

1786.

Saturday,
12th Feb.The KING *against* the INHABITANTS of
BIRMINGHAM.

A hiring for a year to work by the piece, with an implied liberty, from the usage of the place, to be absent when the servant pleases, but not to work for any other master, gains a settlement, though he may have absented himself at different times in the course of the year.

* [334]

THIS was a special case, upon an order of removal, which set forth [1];

That *Thomas Baker*, the husband of one of the paupers, on the 17th of *October*, being unmarried, and having no child, was hired * in the parish of *Birmingham*, by *John Jennings*, a wood-screw maker, resident in that parish for a year, *good earn good hire*, to work for him, and no other master, to make screws at so much a gross; and this was all that passed upon the hiring. That persons are often hired at *Birmingham* under the terms "*good earn good hire*," the meaning of which is, that their pay is to depend upon their work. *Baker* had no wages. He was to have what he got. If he got nothing, he was to have nothing. His master had no business but that of a screw-maker. He was to work in his master's shop, and do no other work. He served a year under the hiring, and, during the year, sometimes lodged with his master, sometimes in another house in the parish, and when he lodged with his master, he paid him for his diet and lodging. He sometimes absented himself to drink or play, for a week or fortnight, and never asked his master's leave for such absence. His master, on his return, was angry, and checked him, but always received him again. During such absence, he never worked for his master, nor did he, nor could he, for any other person. He took the same liberty of absenting himself, as other persons in the same way. The master had often found fault with him, and asked him to work, which he had refused to do, saying, "I won't work unless you will advance me money," to which the master said, it would be worse for him. Masters do usually advance money to persons hired under those terms. *Baker* had said to his master, that he could not compel him to work, and the master, in his absence, had said, that he thought he had no right to compel him. It is generally understood at *Birmingham*, that persons hired to work in shops, under the above terms, may occasionally absent themselves, but cannot work for any other master. Whether the master could or could not prevent *Baker* from absenting himself, or compel him to work, did not appear from any facts, but those above stated. He was hired again under the same terms, and performed his service in the same way.

[1] The case had come on before evidence, instead of facts, it was sent in 7. 19 Geo. 3. but having found back to be restated.

The court of quarter sessions, (for *Shropshire*,) confirmed the order of justices removing *Baker's* widow and child to *Birmingham*.

On *Wednesday*, the 9th of *February*, the *Solicitor General* and *Plumer* shewed cause.—They insisted that a complete hiring for a year was stated. The absences in the middle of the service were cured by the master's taking the servant back, so that the only question was on the contract, which was to be construed by what passed when it was made. Payment by the piece had always been held as good, for the purpose of a settlement, as yearly wages. The circumstances set forth in the case, (a great deal of which was evidence, and ought not to have been stated), only explained the nature of the service, but did not affect the terms of the hiring. The apprehension of the parties was of no consequence, as was determined in *Rex v. King's Norton* (a). In *Rex v. Macclesfield* (b), and *Rex v. Buckland Denham* (c), which might perhaps be cited on the other side, there was an exception in making the contract, as to certain days or hours in the day when the servant was to be at liberty; in the first, it was particularly "stipulated, that the said service was to be only *eleven hours* in the six working days; and all the rest of the time, as well as on Sundays, the pauper was to be at his liberty, and his own master;" in the other, the pauper was hired, "to work *shearman's hours* only." In *Rex v. St. Agnes* (d), the court distinguished between an exception which is part of the contract, and one arising from the custom of the country.

Dunning and *Leycester*, in support of the rule, argued, that when local terms are used, they must be construed according to the sense affixed to them by the understanding of the place. The court of sessions therefore had done right in stating the meaning in which the terms used in this case are understood in the country, and the question would be, Whether, if instead of the words, the interpretation stated had been used in making the contract, that would have been a sufficient hiring? The contract, according to the explanation set forth in the case, was this, "I hire you for a year, but you may absent yourself when you please." This therefore was an exception in the contract itself, not of any particular time, but of all times, at the option of the servant. If the bargain had been to work at such hours as screw-makers usually work, the case would not have been near so strong, and yet it would then have been exactly like that of *Rex v. Buckland Denham*.

1780.

The KING
against
BIRMING-
HAM.

[335]

(a) T. 13 & 14 Geo. 2. *Burr. Settl.*
Case, No. 52.

(c) H. 12 Geo. 3. *Ibid.* No. 218.

(b) E. 31 Geo. 2. *Ibid.* No. 146.

(d) T. 10 Geo. 3. *Ibid.* No. 209.

1780.

The King
against
BIRMING-
HAM.

* [336]

ham. In *Rex v. King's Norton*, only the apprehension of the servant was stated. Here it was the general meaning of the whole country in the use of the particular words by which this hiring was expressed. To make a hiring for a year, * the master should have it in his power to require the service of the person hired at all times. This was rather an agreement not to work with others, than to work with the master. It was like a contract not to marry any other person, which is void. On such a contract as the present, the master could not have maintained an action for the servant's absence, nor could a magistrate have compelled him to serve.

Lord MANSFIELD absent.

WILLES, *Justice*, said, there was some nicety in the case, and therefore the court would take time to consider of it.

This day, being the last day of the term, he delivered his opinion, and that of the two other Judges who had heard the case argued, that there was a sufficient hiring and service at *Birmingham*. He stated the reasons of the judgment at large, and discussed the cases and arguments which had been produced on both sides; but I had then left the court.

Both orders confirmed.

The End of HILARY Term 20 Geo. III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Twentieth Year of the Reign of GEORGE III.

1780.

HODGSON and his Wife against AMBROSE
and Another.

Tuesday,
28th April.

THIS was a case sent, under an order of the pre-
sent Lord Chancellor (a), for the opinion of this
court.

Susan Jollard, spinster, being seised in fee, by her
will duly executed, bearing date the 21st of *August*
1775, devised in the following word:—"I give and
devise unto the Reverend *William Arnold, &c.* and
Isaac Pennington, &c. and their heirs, all that my
manor of *H. &c.* and also all that my other farm
called *D. &c.* and also all other my manors, messuages,
lands and tenements whatsoever, *&c.* to hold the same
unto the said *William Arnold* and *Isaac Pennington* and
their heirs, to such uses, and upon such trusts, and to
and for such interests and purposes, and under and
subject to such provisos and agreements as are herein-
after mentioned, expressed and declared of and con-
cerning the same: that is to say, as to, for, and con-
cerning the said manor and farm called *H. &c.* to the
use and behoof of my dear sister *Elizabeth* the wife of
Mr. John Belciber and her assigns, for and during the
term of her natural life; and after the determination of

If there is a de-
vise to *A.* and
the heirs of his
body, and for
want of such issue
to *B.* and *A.*
dies before the
testator, leav-
ing issue, such
issue shall take
nothing, and
the limitation
to *B.* shall not
be construed an
executory de-
vise, but shall
vest in posses-
sion, as an im-
mediate estate,
on the testator's
death.—The
case of *Coulson*
v. Coulson has
been so long
considered as
law, that the
precise ques-
tion in that case
ought not now
to be litigated.

"that

1780.

HODGSON
against
AMBROSE:

“ that estate, to the use of the said *William Arnold* and
 “ *Isaac Pennington* and their heirs, during the life of the
 “ said *Elizabeth Belchier*, upon trust to support and pre-
 “ serve the contingent uses and estates herein-after li-
 “ mited therein, from being defeated or destroyed, and
 “ for that purpose to make entries and bring actions, as
 “ the case shall require, but nevertheless to permit and
 “ suffer the said *Elizabeth* and her assigns, during her
 “ life, to receive and take the rents, issues, and profits
 “ thereof, to her and their own use and benefit, and,
 “ from and after her decease, then to the use and behoof of the
 “ heirs of the body of the said *Elizabeth* lawfully issuing;
 “ and, for want of such issue, then to the use and behoof
 “ of my dear sister *Catharine Jolland*, spinster, and her
 “ assigns, for and during the term of her natural life: and
 “ from and after, &c.” (the same limitations and in the
 “ same words as before, to the trustees, for the life of
 “ *Catharine Jolland*, and after her death, to the heirs of her
 “ body,) “ and for want of such issue, then to the use and
 “ behoof of my own right heirs for ever. And as, to
 “ for, and concerning, the said farm called *D. &c.* and all
 “ the said rest and residue of my manors, messuages,
 “ lands and tenements whatsoever, subject to, &c.” (the
 “ payment of certain annuities,) “ to the use and behoof
 “ of my said dear sister *Catharine Jolland* and her assigns
 “ &c.” (the same limitations to *Catharine Jolland*, and to
 “ the trustees for her life, as in the devise of the former part
 “ of the estate to *Elizabeth*,) “ and, from and after her de-
 “ cease, &c.” (to the trustees and their executors for
 “ 1000 years without impeachment of waste upon trust
 “ &c.) “ and, after the determination of that term, to the
 “ heirs of the body of *Catharine Jolland*, and for want of
 “ such issue, to the use and behoof, &c.” (the same limi-
 “ tations over to *Elizabeth Belchier*; to the trustees; the
 “ issue of *Elizabeth Belchier*; and the testatrix's right heirs
 “ as to *Catharine Jolland* in the former devise.)—*Elizabeth*
 “ *Belchier* died on the 25th of September 1775, (in the 5th
 “ time of the testatrix), leaving one daughter, *Catharine*
 “ *Belchier*, one of the defendants. The testatrix died
 “ the 11th of May 1776. After her death, *Catharine*
 “ *Jolland*, being advised thereto, made a demise of all the
 “ devised estates for 99 years, in trust for herself. She
 “ then suffered a recovery, to the use of herself in fee
 “ simple, and afterwards married the defendant *Hodgson*
 “ and, in July, 1778, she and her husband entered into
 “ written articles to sell the manor of *H.* under a general
 “ title, to *Ambrose*. In Michaelmas Term 1778, *Hodgson*
 “ and his wife, filed a bill against *Ambrose*, and
 “ against *Catharine*, the daughter of *Elizabeth Belchier*
 “ for a discovery of the said *Catharine's* claim and

and for a specific performance of the articles. The defendant *Ambrose* admitted the articles, and all the facts above stated, but said, he declined the purchase, being advised, that, by the construction of the will, *Catharine Hodgson* might be deemed to have taken only an estate for life, and not an estate-tail, by which means a good title could not be made to him. *Catharine Belchier* submitted the question, and her interest, to the court.

The questions stated for the opinion of this court on the above case, were; 1. Whether *Catharine Belchier*, the daughter of *Elizabeth Belchier*, took any, and what estate, under the will of *Susan Jolland*? 2. What estate *Catharine Hodgson*, late *Jolland*, took under the said will?

The case came on to be argued this day, by *Lee* for the plaintiffs, and *Wilson* for the defendants.

LORD MANSFIELD asked *Wilson*, Whether he meant to contend, supposing the devise to *Elizabeth Belchier* would have been an estate-tail in the event of her surviving the testatrix, that, in the event which had taken place, (of *Elizabeth's* death happening before that of the testatrix,) her issue could take by purchase?

He answered, That he thought he could not maintain that point, after the case of *Goodright v. Wright* [1].

BULLER, Justice, mentioned *Hutton v. Simpson* (b), as a prior case exactly of the same sort (c).

WILSON said, he meant to argue, on the authority of *Hopkins v. Hopkins* (d), that the estate to *Catharine Jolland*, (in the first devise,) which would have been a remainder if *Elizabeth Belchier* had survived the testatrix, became, by her death before the consummation of the testament, an executory devise, and, being limited after an indefinite failure of issue of *Elizabeth*, was void, and the estate descended to the two sisters as co-parceners. That it was held, in *Hopkins v. Hopkins*, that an event happening after the execution of the will, and before the consummation of it by the death of the testator, may vary the nature of the

1780.

HODGSON
against
AMBROSE.

[340]

[1] B. R. H. 1717. 1 P. W. 397. Devise to A. and his issue, remainder to B. and his issue, remainder to the heirs of A. A. dies in the life-time of the testator, without issue. B. dies also in the life-time of the testator, leaving a daughter, who was also heir of A. Held by Parker, Chief Justice, and the whole court, that the daughter took nothing, either as the issue of B. or as the heir of A. though it was argued, that, in the events which had

happened, she might take by purchase under the description of A's heir. S. C. at more length, 1 Str. 25.

(b) Canc. M. 1716. 2 Vern. 722.

(c) Vide also *Fuller v. Fuller*, B. R. M. 37^E & 38 El. 1. Cro. 422. and *Bratt v. Rigden*, C. B. T. 10 El. Plowd. 340.

(d) Canc. M. 1734. Ca. temp. Talb. 44. Vide *Ld. Hardwicke's* opinion on the will in that case, afterwards, 1 Atk. 581, S. C. mentioned 1 Vex. 269.

1780.

HODGSON
against
AMBROSE.

the estate devised, from a remainder to an executory devise; and the intention here most clearly was, that *Catharine Jolland* should take nothing while any of *Elizabeth's* issue remained.

LORD MANSFIELD, — The limitation to *Elizabeth Belbin*, on the present supposition, was of an estate-tail. The whole of that limitation was gone at the testator's death, and therefore the estate to *Catharine Jolland* took place immediately. The words, "and for want of such issue," mean the same thing as "and after such estate-tail," and this is the common case of a remainder after an estate-tail, where, if the first estate never takes place, the remainder vests in possession immediately (e). In *Hopkins v. Hopkins*, the difficulty was, how an event subsequent to the will should vary the construction; but LORD TALBOT got over it.

Some days before, LORD MANSFIELD had observed, that the question, whether the devise to *Elizabeth Jolland* was an estate-tail, was exactly the same as that determined in *Coulson v. Coulson* (f); that LORD HARDWICKE [2] had told him, that he was dissatisfied with that decision; but that he thought it was not now to be shaken. The point therefore was not argued this day at the bar; but his Lordship, and BULLER, Justice, expressed themselves upon it to the following effect:

LORD MANSFIELD, — With regard to the question, whether the interposition of trustees to preserve contingent remainders, shall vary the rule of law, (which says, that where, in the same instrument (g), there is a limitation to the ancestor for life, and one to his heirs general or special, the heirs shall not take by purchase,) whatever our opinion might be upon principle and authorities, if the point were new, we all think, that, since this is literally the same case with *Coulson v. Coulson*, and that has stood as law for so many years, it ought not now to be litigated again. It would answer no good purpose, and might produce mischief. The great object, in questions of property, is certainty, and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering

10

[341]

(e) Vide the cases above cited of *Hutton v. Simpson*, *Rigden v. Brett*, and *Buller v. Fuller*.

(f) B. R. H. 13 Geo. 2. 2 Str. 1125. 2 Atk. 246, 247. 250.

[2] The case of *Bagshaw v. Spencer* was depending at the same time with that of *Coulson v. Coulson*. and the determination postponed till the court of B. R. should make their certificate in the latter, 2 Atk. 246. The traces of

LORD HARDWICKE's dissatisfaction with that certificate, may be discovered in his argument, when he determined *Bagshaw v. Spencer*, 1 Ves. 147. Vide *Jones v. Morgan*, Cant. H. 23 Geo. 3. 1 Br. 206.

(g) Vide *Doe v. Fonnereau*, M. 21 Geo. 3. infra, 470. Where this rule is discussed, and the case of *Hopkins v. Hopkins*, as to the point above-mentioned, is also considered.

to it, than if it were to be overturned. Many estates may be enjoyed under the authority of *Coulson v. Coulson*, the titles to which would be shaken, if the decision in that case were to be overruled; and the case is so generally known among conveyancers, that it is impossible there should be many held under the contrary construction, because, if there were, they would have been controverted.

BULLER, *Juslice*.—It was a long time before I could reconcile myself to the determination in the case of *Coulson v. Coulson*, but now I am not clear, that, even if the question were quite new, I should not be of the same opinion which the court then entertained. If a testator make use of legal phrases, or technical words *only*, the court are bound to understand them in the legal sense. They have no right nor power to say, that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law. But if a testator use other words, which manifestly indicate what his intention was, and shew to a demonstration that he did not mean what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will. Lord HARDWICKE truly said, in *Bagshaw v. Spencer* (b),—"there can be no magic or particular force in certain words, more than others; their operation must arise from the sense they carry."—And I say, *that* sense can only be found by considering the whole will together. There is no rule better established than that the intention of a testator expressed in his will, if consistent with the rules of law, shall prevail. That is the first and great rule in the exposition of all wills, and it is a rule to which all others must bend. It says, "if consistent with the rules of law;" but it must be remembered, that these words are applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words. A man cannot, by will, create a perpetuity; he cannot put the freehold in abeyance; he cannot limit a fee upon a fee; nor make a chattel descendible to heirs; nor prevent a tenant in tail from suffering a recovery. But the question, whether the intention be consistent with the rules of law or not, can never arise, till it is settled what the intention was. This can only be discovered by taking the whole will together. If it be apparent, I know of no case that says, a strict legal construction, or a technical sense of any words whatever, shall prevail against it; unless a case which made a great noise

1780.

HODGSON
against
ANNAON.

[342]

(b) *Cons.* 12 Nov. 1748. 1 *Ves.* 142. 2 *Atk.* 246. 570. 577.

1780.

HOBGSON
against
AMBROSE.

noise in *Westminster-Hall* a few years ago, be considered as such (i). I have no difficulty in saying, that I do not look upon that case as such, nor, if ever a similar case should arise, shall I think myself bound by it, but shall consider the question as if that case never had existed; for the most that can be said of it is, that, as far as it respects any rule of law, there were the opinions of six judges against six (4). I am aware, that, as to the decision of the case between the parties, there were the opinions of seven against five. But it will be found, that the opinion of one of the seven (l) went upon the idea, that it did not appear that the testator meant to use the technical words in a different sense from what the law in general imposes upon them. Whether the intention did sufficiently appear in that case, or not, is a question, which I do not now mean to give any opinion upon.—Much was there said of opinions given by eminent men at the bar. Such opinions, however well considered, have no weight in the scale of justice. One, (dated in 1747,) has got into print (m), but I have the strongest reason to believe, that no such opinion was ever given by the then *Solicitor General*, to whom it is ascribed. An opinion which he gave on the same will, the year before, has been furnished me, by an eminent conveyancer, and it is quite contrary to what is printed; and I have also seen a copy of another, given in 1748, which I have the best reason to believe to be genuine, and which clearly proves, that none was given in 1747.—If the intention does not plainly appear, I agree, that the legal sense of the words must prevail, and, on that ground, I should be strongly inclined to say, in the present case, even if the decision in *Coulson v. Coulson* had never taken place, that *Catharine Jolland* took an estate-tail; for the testatrix had used nothing but legal words. The devise is to *A.* for life, remainder to trustees to support contingent remainders, remainder to the heirs of the body of *A.* If there had been no devise to trustees, the case would be so plain, that no man could doubt about it. What then is the nature of such devise to support contingent remainders? It is a legal and technical limitation, the peculiar language of conveyancers. The effect of this sort of limitation, in a deed, is settled. There, it is not sufficient to turn words of descent into words of purchase. The testatrix has not shewn, by any other words,

[343]

(i) *Perrin v. Blake*, B. R. H. Baron, Adams, Baron, Gould, Justice, 10 Geo. 3. Cam. Scacc. H. 12 Geo. 3, Perrot, Baron, and Nares, Justice.
4 Burr. 2579. 2581. 1 Blackst. 672. (l) Blackstone, Justice. Vide 4 Burr.

(k) Lord Mansfield, Aston, Justice, 2581.—The account there given of the and Willer, Justice, in B. R. and De substance of Mr. J. Blackstone's opinion Grey, Chief Justice, Smythe, Baron, was furnished by himself.

and Blackstone, Justice, against Yates, (m) *Faarne* on Cont. Rem. 3d Edit. Justice, in B. R. and Parker, Chief 123.

words, that she meant to use the technical expressions in a different sense from what the law has put upon them, and, therefore, the legal sense must prevail. This distinction was expressly recognized by Lord Northington, in a case of *Austin v. Taylor* (n).—It seems to me to be false logic, to put a different sense upon any words from what in general they import to bear, by mere inference from the words themselves, unexplained by any others; though, if other words manifest the intent, I know of no law that says, the intent shall not prevail.—But whatever might have been my opinion on the subject, if neither *Duncombe v. Duncombe* (o), nor *Coulson v. Coulson*, had ever existed, yet, after those decisions, and the great length of time during which they have been considered as law, I look upon them as landmarks, which ought never to be removed, nor shaken.

Lord MANSFIELD said, since it had been mentioned, he must take notice, that it was most certainly true, that he never gave any such opinion as that in print, nor any opinion at all, on that will in 1747. Several opinions had been taken at different times, as events arose, by Mr. John Sharpe, the solicitor, whose brother, Mr. Joshua Sharpe, had furnished the court with copies of them, upon the argument of *Perrin v. Blake*. There were three given by Sir Dudley Ryder, and three by himself. Of those given by himself, the first was before 1746, the second in that year, and the third in 1748. He had the copies still by him, and the third stated, that he had perused his two former opinions, dated so and so, and concurred therewith, viz. that John only took an estate for life, which shewed it to be impossible that he had given a contrary opinion. The author had been too hasty in his publication, and must have been imposed upon [3].

1780.

HODGSON
against
AMAROSE.

(n) He cited this case from a MS. Note.

(o) *C. B. H. 7 Will 3. 3 Lev. 437.*

[3] Mr. J. Blackstone (1 *Blackst.* 672.) states the question in *Perrin v. Blake* as coming on upon a special verdict, whereas it came before the court of B. R. on a demurrer to a replication. The short history of the proceedings in that case is this: An ejectment was brought in *Jamaica*, where the estate lay, and a special verdict found, which came over for the opinion of the Privy Council, upon an appeal in the nature of a writ of error. Lord Mansfield, (the only law lord who then attended the Council,) know-

The ing the several opinions which had been taken, and considering the question as a point of general tendency, which might affect titles to real property in *England*, was unwilling that judgment should be given in the *Cockpit* merely on his opinion, and therefore proposed, with the consent and concurrence of the counsel on both sides, that the appeal should be adjourned, and, in the mean time, a solemn opinion taken in *Westminster-hall*. At first, it was agreed to state a case for the opinion of the Court of B. R. which might have been adjourned on account of difficulty into the *Exchequer Chamber*; but a case from the King,

1780. The certificate was in the following words:
 " If *Elizabeth* would have taken an estate-tail, in case
 " she had survived the testatrix, we think, by her dying
 " before the testatrix, it is a lapsed devise, and *Catharine*
 " the daughter of *Elizabeth*, can take nothing [4]. As to
 " the

in his judicial capacity, being new *, it was, afterwards, thought better that the point should be brought before the court, upon the pleadings in a feigned action of trespass. *Walker*, Serjeant, settled the record for that purpose, on which, to a declaration in trespass, (laid in *Middlesex* under a *videlicet*,) the defendant pleaded the will. The plaintiff replied the recovery, (on the ground that the son took an estate-tail,) and to this replication, the defendant demurred. After a writ of error had been brought in the House of Lords, from the judgment of reversal in the Exchequer Chamber, and had depended for a considerable time, the parties compromised the dispute, and the plaintiff petitioned for leave to non-pros his writ of error, which was granted, as appears from the following entry in the Lords' Journals:

7th May 1777.

Blake
 against
 Perrin and Another. } " Upon read-
 " ing the peti-
 " tion of *Han-*
 " *nab Blake* plaintiff, in a writ of error
 " depending in this House, and of
 " *William Perrin* and *Thomas Vaughan*
 " defendants in the said writ of error,
 " which stands appointed for hearing,
 " setting forth, That the matters in
 " dispute between the parties being
 " now amicably compromised between
 " them, the petitioners therefore hum-
 " bly pray their Lordships, that the
 " writ of error in this cause may be
 " non-prossed, or withdrawn without
 " costs on either side;—It is ordered

" that the said petitioners do forthwith
 " enter a *non-pros* on the said writ of
 " error as desired, and that the record
 " be remitted to the court of King's
 " Bench, to the end execution may be
 " had upon the judgment given by
 " that court, as if no such writ of
 " error had been brought into this
 " House."

[4] It appeared, by the pleadings in Chancery, and the printed cases in *Dom. Proc.* (though not by the case sent to this court,) that the testatrix had two brothers, so that *Elizabeth* and *Catharine* were not her heirs at law. In the case of *Warner v. White* on the demise of *White* (which was a writ of error from *Ireland*, and was argued in *T. 21* and *M. 22* *Geo. 3.* and determined in that last-mentioned term,) an attempt was made to make a difference between the case of a first devise to the heir at law, and the heirs of his body or his heirs, and one to a stranger, when such first devisee dies before the testator; and it was contended, that where an heir at law is the first devisee, the estate shall not go over to the next in limitation, but shall vest in the heirs of the body, or heirs, (as the case may be), of such heir at law, either as taking by purchase, or, (on the ground of an eventual intestacy,) by descent. To maintain this point, the opinion of *Popham*, in *Fuller v. Fuller* *H. 36* *El. Cro. El. 412, 3.* was chiefly relied on, and the court of *B. R.* in *Ireland* unanimously adopted it; but, here, their judgment was unanimously reversed.

* It is understood that the Master of the Rolls cannot send a case to any of the courts of law, and, therefore, when he wishes to take their opinion, the

practice is to direct a feigned action or issue, so as that the question of law may arise upon the finding of the jury. [† 90].

[† 90] It should seem from 2 *Atk.* 248. that a case was sent to the court of *B. R.* by the Master of the Rolls in

Coulson v. Coulson; however, the established notion and practice is as above stated. *Vide infra*, p. 772. *Note* [1]

" the question whether *Elizabeth* would have taken an
 " estate-tail, whatever our opinions might be, if the case
 " were new, we think, as the case of *Coulson v. Coulson* is
 " literally the same, the precise question ought not to be
 " again litigated, and by that authority we are bound to
 " say, in the words of the certificate in that case, that, as
 " it appears that there is, after the determination of the
 " estate for life to *Elizabeth Belchier*, a devise to *William*
 " *Arnold* and *Isaac Pennington*, and their heirs, for and
 " during the life of *Elizabeth Belchier*, we are of opinion,
 " that *Elizabeth Belchier*, if she had survived the testatrix,
 " would have taken an estate for life in the premises de-
 " vised to her, not merged by the devise to the heirs of
 " her body, but by that devise an estate-tail in remainder
 " would have vested in the said *Elizabeth*. Consequently
 " *Catharine Belchier*, the daughter of *Elizabeth*, took no
 " estate under the will of *Susan Folland*, but *Catharine*
 " *Hodgson*, late *Catharine Folland*, took an estate for life,
 " in all the devised premises, not merged by the devise to
 " the heirs of her body, but, by that devise, an estate-tail
 " in remainder vested in the said *Catharine Folland* [5]

1780.

Hobson
against
Amrose.

24th April 1780.

MANSFIELD.

E. WILLES.

W. H. ASHHURST.

F. BULLER."

[5] The Lord Chancellor, in consequence of this certificate, having decreed a specific performance of the agreement, an appeal was lodged in the House of Peers, and the two questions stated to the court of King's

Bruch having been put to the Judges, and *Skynner*, Chief Baron, having delivered their unanimous opinion to the same effect with the certificate, the decree was affirmed.

The KING against JOHN WHEATMAN.

Wednesday,
19th April.

THIS was a rule to shew cause, why a conviction for using a gun should not be quashed. The objection was, that the information, as set forth in the conviction, did not alledge specifically, that the defendant was "not owner or keeper of any forest, chase, park, or warren."

It was contended, that it is necessary to state in the information, particularly, that the defendant had none of the qualifications * enumerated in the statute of 22 & 23 Car. 2. (a). The case of *Rex v. Maurice Jarvis* (b), was relied on, as a decisive authority in point.

On the other side, it was argued, that it is sufficient, if the want of every one of those different qualifications ap-
 pear

In a conviction on the game laws, the information must negative, specifically, every one of the qualifications in the st. of 22 & 23 Car. 2. c. 25.

*[346]

(a) C. 25. § 3.

(b) H. 30 Geo. 2. 1 Burr. 148.

1780.
The KING
against
WHEAT-
MAN.

pear in any part of the record, and it did appear by the evidence, as set forth, that the defendant had none of them.

Chambre, in support of the rule.—*Dayrell*, for the prosecutor.

LORD MANSFIELD,—This will not do. The defendant can be convicted only of the charge in the information, and *that* must be sufficient to support the conviction.

ASHHURST, *Justice*.—The evidence must prove, but cannot supply any defects in the information [C].

The rule made absolute.

[C] And, though the information *v. Crowther*, B. R. H. 26 Geo. 3. must, the evidence needs not negative 1 T. R. 125. 127. specifically all the qualifications. *Rex*

Wednesday,
19th April.

The KING against the INHABITANTS of UTTOXETER.

An appointment of separate overseers for the subdivisions of a parish cannot be supported unless it expressly appear that the parish could not reap the benefit of the st. of 43 Eliz. c. 2.

ON Wednesday, the 9th of February, H. 20 Geo. 3. *Bearcroft* obtained a rule to shew cause, why an order of sessions, confirming separate appointments of overseers of the poor for the township of *Uttoxeter*, and three other divisions of the parish of *Uttoxeter*, in *Staffordshire*, should not be quashed; and, cause being this day shown, the special case stated by the sessions appeared to be as follows:

The parish of *Uttoxeter* is five miles in length, and five in breadth, and contains the townships of *Uttoxeter*, *Crakemarsh*, *Creighton*, *Stramshall*, and *Loxley*. The town of *Uttoxeter* is a large market town, much burthened with poor. The townships of *Creighton*, *Crakemarsh*, *Stramshall*, and *Loxley*, are in general divided into considerable farms. The said townships were and are one entire parish, and did, till the year 1730, jointly relieve and maintain the poor in and throughout the parish. It appears by the vestry-book of the said parish, that, from the year 1643, to the year 1703, overseers have been elected for the said respective townships in the following manner, viz. Two overseers of the poor for the town of *Uttoxeter*, one for *Loxley*, one for *Crakemarsh*, *Creighton*, and *Stramshall*, one for the *Woodlands*. The *Woodlands* are part of the township of *Uttoxeter*. It does not appear, from the vestry-book, or other evidence, that, from the year 1703 to 1727, any overseers were elected for the said townships, but two overseers were elected for the said parish, and, during that time, churchwardens were elected for the said parish, and sidersmen for the said townships. On the 10th November 1730, in pursuance of a *mandamus* from the court of *King's Bench*, an assessment for the relief and maintenance of the poor of the said parish of *Uttoxeter*, upon all the inhabitants and occupiers

[347]

occupiers of land within the said parish, was duly signed by two justices of the peace. In *Trinity Term*, 5 & 6 Geo. 2. 1731, a *mandamus* issued from the court of *King's Bench*, to the justices of the county of *Stafford*, reciting that there were divers householders within the said parish of *Uttoxeter* able to contribute to the relief of the poor of the said parish, and that there were no overseers of the poor of the said parish appointed to make rates on all and every the inhabitants and occupiers of lands, houses, and other things rateable within the said parish, for the relief of the poor of the said parish, and ordering the said justices to appoint two or more overseers of the poor of the said parish of *Uttoxeter*. In pursuance of the said *mandamus*, on the 30th day of *July* following, two justices of the peace for the county of *Stafford*, appointed two overseers of the poor for the said parish of *Uttoxeter*. At the general quarter sessions for the county of *Stafford*, held the 5th of *October*, 6 Geo. 2. 1731, the inhabitants of the vill of *Crakemarsh*, *Creighton*, and *Stramshall*, appealed against an assessment made 12th *August* preceding, for the maintenance of the poor of the parish of *Uttoxeter*, and, on full hearing of counsel, and consideration of the evidence given as well for the said vill as for the township of *Uttoxeter*, the court was of opinion, that the inhabitants of the said vill of *Crakemarsh*, *Creighton*, and *Stramshall* (for which vill overseers of the poor were duly and in due time appointed, and poors-rates duly made and allowed, before the making of the said assessment or rate appealed against) ought to maintain, and accordingly did order that they should maintain, their own poor, distinctly and separately from the other parts of the said parish of *Uttoxeter*; and the court did further order, that such part of the said assessment or rate appealed against, as charged the inhabitants of the said vill of *Crakemarsh*, *Creighton*, and *Stramshall*, for or towards the maintenance of the poor of the said parish of *Uttoxeter*, in respect of what they hold or occupy within the said vill, should be quashed and discharged. The said order, in *Michaelmas* term following, was removed, by *certiorari*, into the court of *King's Bench*, and the court of *King's Bench*, in *Michaelmas Term*, 6 Geo. 2. ordered, that the order of sessions, as to such part of it as orders that the inhabitants of the vill of *Crakemarsh*, *Creighton*, and *Stramshall*, in the parish of *Uttoxeter*, shall maintain their own poor distinctly and separately from the other part of the said parish of *Uttoxeter*, be quashed for the insufficiency thereof; and, as to the other part of the said order, for the quashing and discharging such part of a certain assessment or rate made for the maintenance of the poor of the said parish of *Uttoxeter*, as charges the inhabitants of the said vill of *Crakemarsh*, *Creighton*, and *Stramshall*, towards

1780.

The KING
against
UTTOX-
ETER.

[348]

1780.

The KING
against
UTTOX-
ETER.

wards the maintenance of the poor of the said parish of *Uttoxeter*, in respect of what they hold within the said vill, be affirmed. In *Michaelmas Term*, 7 Geo. 2. 1733, a *mandamus* issued from the court of *King's Bench*, to the justices of the county of *Stafford*, reciting, that there were divers householders within the said parish of *Uttoxeter* able to contribute to the relief of the poor of the said parish, and that there were no overseers of the poor of the said parish, appointed to make rates on all and every the inhabitants and occupiers of lands, houses, and other things, rateable within the said parish, for the relief of the poor of the said parish, and ordering the said justices to appoint two or more overseers of the poor for the said parish of *Uttoxeter*. On the 15th of *April* 1734, two overseers were appointed for the vill of *Crakemarsh*, two other overseers for the vill of *Creighton*, two other overseers for the vill of *Stramshall*, two other overseers for the township of *Uttoxeter*, and two other overseers for the vill of *Loxley*, by five separate appointments, each appointment signed by the same two justices of the peace for the county of *Stafford*. On the 27th of *May* following, a *certiorari* issued to remove the said five appointments into the court of *King's Bench*, which were accordingly removed, and, on *Saturday* next after the morrow of the *Holy Trinity*, 1734, the said five appointments were affirmed by the court of *King's Bench*. Since the year 1734, overseers have been separately appointed for each of the said townships, and the poor of the said townships have been separately maintained [1].

[349]

The *Solicitor General*, *Dunning*, and *Leycester*, shewed cause, and argued to the following effect.—It appears from the facts found by the special case, that the inhabitants of the parish of *Uttoxeter* have not had the benefit of the statute of 43 *Eliz.* (c), and therefore the appointments of separate overseers for the different townships were authorised by 13 & 14 *Car. 2. c. 12. § 21.* It is clear, that at and before the time when the last-mentioned statute was enacted, this parish did not reap the benefit of the act of *Elizabeth*, since more than four overseers had been appointed ever since the year 1643, and that statute does not authorise more than that number [2].—(BULLER, *Justice*.—“Ought it not to have been stated in the case, as a substantive fact, that the parish had not had the benefit of “the statute of 43 *Eliz.*?”)—If enough is clearly and explicitly stated to shew that to be the truth, the court will infer

[1] The present division of the parish on which this case arose, was different from that mentioned in the case to have subsisted since 1734. There were but four appointments. They all bore date the same day, and were

signed by the same two justices.

(c) C. 3.

[2] So determined in *Rex v. Loxdale*, *H. 30 Geo. 3. 1 Burr. 445.* and more fully stated in 3 *Burn's Just.* 289. 13th edit.

infer it, without an express finding, for the purpose of supporting the order. The rule with regard to orders of sessions is the reverse of what obtains in the case of convictions. The court presumes against convictions, unless facts appear sufficient to support them; but an order of sessions is presumed to be right, unless the facts stated prove it to be wrong. It may be objected, that the present division of the parish is different from that which appears to have been formerly adopted, but no argument can arise from that circumstance, because the statute of *Car. 2.* meant to leave the particular division to the justices for the time being. The determination of this court in *M. 6 G. 2.* (as mentioned in the case, and as reported by *Barnardiston (d)*.) was a decision of the present question; for, although the first part of the order of sessions was quashed as insufficient, because it did not appear whether the vills of *Crakemarsh, Creighton, and Stramshall*, were to maintain their poor jointly among themselves, or each vill separately, the other part, quashing the assessment of those vills for the maintenance of the poor of the parish at large, was affirmed. The case of *Rex v. The Justices of Middlesex (e)*, and *Peart v. Westgarth (f)*, which will be relied on by the other side, differed materially from the present, for, in both of those, it appeared from the facts stated, that the parishes had had the benefit of 43 *Eliz.*—*Dunning* said, he particularly recollected the case of *Rex v. The Justices of Middlesex*, which had happened during his early attendance on the court, and that it was the ultimate opinion of the court there, (which they afterwards confirmed in *Peart v. Westgarth*.) that the parish must have been unable to reap the benefit of 43 *Eliz.* at the time when the statute of 13 & 14 *Car. 2.* passed, which he said was manifestly the case as to the parish of *Uttoxeter*.

Beacroft, in support of the rule, insisted on *Peart v. Westgarth*, as directly in point, and that it was clearly established by that case, that unless the sessions expressly state, that the parish has not had the benefit of 13 & 14 *Car. 2.* the court will presume that it has. That the statute of *Car. 2.* mentions *largeness* as the only reason for a division, and the case of *Peart v. Westgarth* shews, that the parish of *Uttoxeter* is not too large; for there, the parish of *Stanhope* appeared to be twenty miles long, and yet it was not to be divided, and *Uttoxeter* parish is only five miles. The question now before the court never came on in any of the former cases from this parish.

Lord MANSFIELD stopped *Wilson* from going on, on the same side.

Lord

1780.
The KING
against
UTTOX-
ETER.

[350]

(d) 2 *Barnard. B. R.* 198.

(e) *T. 27 & 28 Geo. 2. Bott.* 17.

VOL. I.

(f) *B. R. H. 5 Geo. 3. 3 Burr.* 1610.

1780.
The KING
against
URTOX-
ETER.

LORD MANSFIELD,—The case of *Peart v. Westgarth* decides the question. It must appear to the court that there was a disability to reap the benefit of the statute of *Elizabeth*. Here the contrary appears. Though there were separate overseers, there was a joint maintenance till 1730. The acquiescence of the parish for a number of years will not alter the law. The point never seems to have been made in 1734. I remember the case of *Peart v. Westgarth*. It was well considered. The court thought the statute of *Car. 2.* proceeded on a bad principle of policy, for that large districts for the purpose of maintaining the poor are much to be preferred to small ones.

The order of sessions, and the four appointments, quashed.

Thursday,
20th April.

LLOYD, (*qui tam*, &c.) against SKUTT.

A writ of error from this court to the Exchequer Chamber cannot be quashed by this court.

* [351]

IN the last term, *Dunning* had obtained a rule to shew cause, why a writ of error removing the judgment in this cause, (which was an action of debt upon the statute of usury (*a*),) into the court of Exchequer Chamber, should not be quashed; and, on * Friday, the 14th of April, the case was argued by *Dunning*, in support of the rule, and by *Davenport*, on the other side.

The objections were; 1. to the form of the writ, because it described the action as between the two private parties, *Lloyd* and *Skutt*, not as a *qui-tam* action in which the King was interested; 2. to the substance, on the ground that this sort of penal action is not within the meaning of the statute of 27 *Eliz. c. 8.* which first gave the writ of error from this court to the Exchequer Chamber. The first point was but little relied on. Upon the second, it was insisted, either that the action is not within the meaning of the description in the statute, or that, if it is, it is within the exception. The description is, "any suit or action of debt, detinue, covenant, account, action upon the case, *ejectione firmæ*, or trespass." The words "action of debt (*b*)," it was said, extended only to actions of debt between private parties at common law, not to an action on a statute, which is considered as of a higher nature. For this distinction, the opinion of Lord Holt in *Asbby v. White* (*c*) was cited, where he refers to *Cro. Car. 142.* and says, "That no writ of error lies in the Exchequer Chamber by force of the statute of 27 *Eliz.* on a judgment in the King's Bench in an action "*de scandalis magnatum* (*d*), for it is not included within

(a) 12 *Ann. fl. 2. c. 16. Vide supra*,
p. 62. Note [2].

(b) 27 *El. cap. 8. § 2.*

(c) *B. R. T. 2 Ann. 2. Ld. Rep.*
938.

(d) 2 *Ric. 2. fl. 1. cap. 5.*

the words of the statute; for though the statute says "such writ shall be upon judgments in actions on the case," yet it does not extend to that action, *although it be an action on the case*, because it is an action of a far higher degree, being founded specially upon a statute (e)." The exception in the act of *Elizabeth* is, "Other than such (actions) only where the Queen's Majesty shall be a party (f)," and it was argued that the King being a party here, the exception extended to the present case. For this *Whitton v. Preston* (g) was cited, in which, according to the report of *Hartop v. Holt* in 5 *Mod.* (h), it appears to have been decided that, for this reason, a writ of error will not lie in the Exchequer Chamber on an action for usury. So in a note at the end of *Parris's Case*, in *Ventris* (i), the same doctrine is stated as established law. In the late case of *Richards, qui tam, v. Brown* (k), although the action was, as here, by bill [3], the writ of error was brought immediately in the House of Lords.

1780.

LLOYD
against
SKUTT.

[352]

On the other side, it was contended, that *Whitton v. Preston* did not appear, by the only express report in print of that case (l), to have been decided; That the only point determined in *Hartop v. Holt* was, that error in the Exchequer Chamber would not lie on an award of execution on a *scire facias*, after the original judgment had been affirmed on a writ of error; That the note at the end of *Parris's Case* is merely a memorandum of the Reporter, not warranted by the case, which is on quite a different subject, nor by any authority; That the case of *Lord Say & Seal v. Stephens*, in *Cro. Car.* 142. went on the construction of the statute of *scandalum magnatum*, and on the question whether an action on that statute is an action on

(e) 2 *Ld. Raym.* 954.(f) 27 *El. c.* 8. § 2.(g) *B. R. H.* 16 & 17 *Car.* 2. 1*Sid.* 240.(h) *T.* 8 *Will.* 3. 5 *Mod.* 230.(i) *B. R. M.* 21 *Car.* 2. *Vent.* 49.(k) *Supra*, 109.

[3] The words of the statute of *Elizabeth* do not confine the appellate jurisdiction of the Exchequer Chamber to actions by bill, unless the expression "first commenced there" can have that operation. In *Comberbach* 295. *Lord Holt* says, "It hath obtained, that no writ of error lieth in the Exchequer Chamber where the action was commenced here by original, but I never understood the reason of it."—By the words of the statute, the Chief Justice is to cause the record to be

brought before the Judges in the Exchequer Chamber, yet the practice has always been to send only a transcript, the original record remaining still in *B. R.*—In the pleadings in *Westby's Case*, (3 *Co.* 67. a. 70. b.) the entry of the proceedings in error runs thus: "Afterwards, &c. the transcript of the record and proceedings, &c. by a certain writ of the Lady the Queen of correcting errors, &c. was brought to the justices, &c. in the Chamber of the Exchequer aforesaid, according to the form, &c." Yet the subsequent part of the same entry says, "and thereupon the record aforesaid &c. was sent back, &c."—*Vide Rutler v. Redstone*, 2 *Str.* 837. and *Tully v. Sparkes*, 2 *Lord Raym.* 1571. (l) *Viz.* in 1 *Sid.* 240.

1780.

LLOYD
against
SKUTT.

[353]

on the *case*, within the meaning of 27 *Eliz. c. 8*; but that it had been expressly decided, in *Scott v. Knapton*, ^(m) which was posterior to *Whitton v. Preston*, that a writ of error will lie on a *qui tam* action of *debt* on a penal statute; and the answer there given to the objection that the King is a party, was, that he is not properly so, though he is to have part of the penalty; That, in truth, no body on the part of the Crown had any thing to do with this action; The informer might be nonsuited, and was liable to costs, and to all the incidents to which a plaintiff in any common action is subject; The King's interest only commenced after a recovery, for a share of the penalty.— Besides, it should seem, (it was said,) that this court ought not to entertain the present motion, according to the opinion of *Croke*, Justice, in the *case* of *Lord Say & Seal v. Stephens*, where he observes that the validity of the writ ought to be discussed in the Exchequer Chamber, where it is returnable.

Dunning said, the *cases* shewed that this court had, in fact, exercised the power of quashing such writs; but, if the court were of opinion that they could not give that relief, the rule might be altered, and leave be given to the plaintiff to take out execution, as if no writ of error had been brought. But Lord MANSFIELD thought *that* could not be done, because, if the objections were good, the writ was not a nullity, but only erroneous:—*improvidē emanavit*.

The court took time to consider; and, this day, Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—We have considered this *case*, and have talked with all the other Judges upon it, and we are all of opinion, that the writ of error cannot be quashed here, but that the application ought to be made, either to the court of Chancery, from whence it issues, or to the Exchequer Chamber, where it is returnable.

The rule discharged [† 91].

(m) *Scacc. E.* 31 *Car. 2.* Sir Thomas Raym. 275.

[† 91] A similar application was afterwards made, first to the court of Chancery, which refused to entertain

the question, and then to the court of Exchequer Chamber, where it was determined, that the writ of error lies to that court.

1780.

The KING *against* the BENCHERS of GRAY'S INN, on the Prosecution of WILLIAM HART.Friday,
21st April.

THIS was an application for a *mandamus* to be directed to the Benchers of *Gray's Inn*, to compel them to call the prosecutor to the degree of a barrister at law. In the last term (s), *Dunning* had moved for a rule to shew cause, on an affidavit, stating that the ground upon which the Readers and Benchers had rejected him was, his having been discharged under an insolvent debtor's act; but that he had complied with all the usual requisites, such as paying the dues, and performing exercises, and that the two societies of the *Inner* and *Middle Temple*, upon their being consulted by that of *Gray's Inn*, had been of opinion that the ground of rejection was not sufficient. The affidavit also mentioned two late instances, one of a bankrupt, another of a person who had been discharged as an insolvent debtor, who had been called to the bar. It appeared that the society of *Lincoln's Inn* had been of opinion, when consulted, that the cause was sufficient.

A *mandamus* will not lie to compel admission to the degree of barrister.—The only mode of relief is by appeal to the 12 Judges.

[354]

In behalf of the application, it was urged, that it would be highly inconvenient to permit such a body as the Benchers of an Inn of Court to exercise a jurisdiction in such matters, uncontrollable by a court of law, and that, in the present instance, there had been manifest injustice in permitting the prosecutor to lose his time, and put himself to expence, in order to qualify himself for the bar, if he was thought to be a person incapable of being called.

Lord MANSFIELD said, he had a recollection of some cases, where it had been held that the court could not interpose, but that the recourse must be to the twelve Judges, who have a domestic jurisdiction over the Inns of Court.—WILLES, *Justice*, mentioned *Booreman's Case* (t), —and BULLER, *Justice*, that of *Rakestraw* and *Brewer* (u) —as confirming what fell from his Lordship. Some passages in *Dugdale's Origines* were also referred to by the court.

The court took time to consider whether they should grant a rule to shew cause, and, on this day, Lord MANSFIELD delivered their opinion as follows:

Lord MANSFIELD, —We have consulted the other Judges on the subject of this application, and I am prepared to state

(s) *Thursday*, the 13th of *April*.(u) *Canc. H.* 1728. 2 *P. W.* 511.(t) *B. R. H.* 17 *Car.* 1. *March* 512.

1780.

The KING
against
GRAY'S
INN.

[355]

state the result. The original institution of the Inns of Court no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar, is delegated to them from the Judges, and, in every instance, their conduct is subject to their controul as visitors. This will appear from a great variety of instances of orders made at different periods, for the regulation of those societies, which are to be found in *Dugdale's Origines Juridicales*, some of which I will mention.—His Lordship then read different passages from *Dugdale*, (141. 147, 148. 191. 193. 274. 275. 311, 312, 313, 314. 317. 319. 320. 322. 327).—From the first traces of their existence to this day, no example can be found of an interposition by the courts of *Westminster Hall* proceeding according to the general law of the land; but the Judges have acted as in a domestic forum. The only case in which an attempt was made to proceed in this court is reported in *March (v)*—One *Booreman*, a barrister of one of the *Temples*, having been expelled, he applied for his writ of restitution, but it was denied, “because there is none in the inn of court to whom the writ can be directed, for it is no body corporate, but only a voluntary society, and submitting to government; and the ancient and usual way of redress for any grievance in the Inns of Court, was by appealing to the Judges.”—In *Townsend's Case*, reported by *Sir Thomas Raymond (w)*, it is assumed, *arguendo*, that no *mandamus* will lie to the Inns of Court [† 92]. I do not take the first reason stated in *March* to be the true one. It is not solid. The second is the true reason. As to the first, the Inns of Court had regulations, they acted and were known as a body, and all the orders which I have mentioned were directed to them. But the true ground is, that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the Judges. There has been a very late instance where this method of appeal had the sanction of all the Judges. I will state it from a report of it drawn up by *Mr. Justice GOULD*, and which he has furnished me with [1].

“The first day of *Hilary Term*, an appeal of one *Maurice Savage* against an order of the Benchers of *Lincoln's Inn*.”

(v) *Booreman's Case*.

(w) *B. R. H. 14 & 15 Car. 2. Raym. 69.*

[† 92] *S. P.* recognized by *Pemberton*, Chief Justice, in the case of *Rex v. The College of Physicians, B. R.*

H 33 & 34 Car 2 Show. 178.

[1] *Mr. Justice Gould* was so obliging as to permit me to copy his note of *Savage's Case*, exactly as it was read in court by *Lord Mansfield*.

coln's Inn, which rescinded an order for his call to the bar, made about four or five days before, on the ground of misrepresentation or surprise, was heard by all the Judges, except Lord Chief Justice DE GREY, in *Serjeant's Inn Hall*. He had been a member of the Middle Temple nine or ten years; had kept and paid for his commons, and performed all his exercises there; and, in 1772, was proposed by a master of the bench, the first parliament in the term, to be called to the bar, (the course in that house being to hold a parliament on the first and last *Friday* in every term, the person to be proposed at the first, and called to the bar at the last parliament.) But he waved that proposal, and, in *Trinity Term* last, petitioned to have the proposal revived, but the bench refused it, and no master of the bench would propose him again. On *Saturday*, (as the term ended on *Wednesday*,) he had a certificate (*), from the under-treasurer of the *Middle Temple*, of his keeping and paying for commons, and performing his exercises, which he carried to the under-treasurer of *Lincoln's Inn*, that *Saturday*, paid his fees for admission in that society, and, the *Tuesday* following, was called to the bar there, and the next day took the oaths to government in *Westminster Hall*. But he did not disclose to the under-treasurer of *Lincoln's Inn* what had passed in the *Temple*. The society of *Lincoln's Inn*, hearing of this matter, issued a summons to him to appear three days after, to shew cause, why his call to the bar should not be vacated, and after hearing him, four days afterwards, annulled the call to the bar as irregular, and obtained by surprise. The Judges, being attended by the treasurers of the two societies, and examining the under-treasurers of each, (not upon oath, for they proceeded as visitors,) and the above circumstances fully appearing, and, after hearing *Savage* in support of his appeal, who did not examine any one to vary the facts, declared their opinion that the call to the bar appearing to have been obtained by surprise, and the bench of *Lincoln's Inn* having proceeded immediately to annul it, the appeal should be dismissed [4].”

1780.

The KING
against
GRAY'S
INN.

[356]

The

(*) Dated the 21st of June 1776.

[4] A year or two afterwards, *Savage* having appeared as a witness in a cause at *Gloucester*, one of the counsel observing upon his evidence, mentioned the circumstance of his having been called to the bar, and the ignominy with which he had afterwards been disbarred. For this, *Savage* brought an action, declaring as a barrister, and stating the words to have been, “*This is the Mr. Savage who was called to*

“*the bar in 1776, and was afterwards scandalously stripped of his gown,*” and that they were spoken with an intent to injure him in his profession. The defendant pleaded not guilty, and also three special pleas of justification, wherein were set forth, the constitution and regulations of the inns of court, respecting the call of barristers, and the different proceeding and orders of the *Middle Temple* and *Lincoln's Inn* referred to in the above report of Gould, Justice.

1780.

The consequence of all this is, that we are all of opinion, that no rule should be made for a *mandamus*; but, if there is a ground for it, the party must take the ancient course of applying to the twelve Judges [5].

Justice. The cause was tried at *Gloucester* summer assizes 1780, before *Perryn*, Baron. The plaintiff proved the words *, and produced a book of the society of *Lincoln's Inn* containing the order for his call, which, from the neglect of the officer of the society, had not been expunged. The defendant produced another book containing the order annulling the former, which was in the following words: "Mr. *Maurice Savage*, who was called to the bar on the 25th of *June* last, having applied for admission to this society, on the *Saturday* preceding, by a certificate from the society of the *Middle Temple*, and represented that he had, by mistake, omitted to apply for his call at the *Temple* in due time for this term, and it appearing that he had applied there in time, but his petition was not moved by any benchers, and that notice had been given to him of the manner in which his petition had been treated by the under-treasurer of the *Middle Temple*, It is ordered that all the fees and expences paid by him be returned, and the order for his call expunged as irregular, and obtained

"by surprize." The jury found a verdict for the defendant.

[5] *Hart*, afterwards, applied by petition of appeal to the twelve Judges, and, on the 15th of *Nov. M. 21 Geo. 3.* he was heard by his counsel, (*Morgan* and *Lind.*) His petition was accompanied with the same affidavit which had been produced to the court of *King's Bench*. At the same time, a certificate was laid before the Judges from the treasurer and benchers of *Gray's Inn*, in which they set forth, that they had not refused to call him to the bar merely because he had been discharged by an insolvent act, (although they stated that the society of *Lincoln's Inn* had been of opinion that that was a sufficient cause,) but, because it appeared to them from a memorial of his own, (which he had also laid before the Judges,) that he had knowingly become security for money borrowed by others, to a much greater amount than he was able to answer, and for other circumstances of his life mentioned or alluded to in the certificate.—The Judges were unanimous in dismissing the petition.

* The witness swore to them exactly as laid, but, though not less severe upon the plaintiff, the words really

spoken were, (according to the recollection of several persons present,) somewhat different.

Friday,
21st April.

EARLE *against* HARRIS.

On a warrant to sail from *Yumalea*, on or before a day certain, if the ship departs from her port on that day, with all her cargo and

clearances on board, and proceeds to the place of rendezvous in the island, expecting to find convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready.

THIS was an action on a policy of insurance, tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, when a verdict was found for the plaintiff. On *Thursday*, the 13th of *April*, the *Solicitor General* obtained a rule to shew cause, why there should not be a new trial, which was this day argued, by *Beaumont*, and *Davenport*, for

for the plaintiff, and the *Solicitor General*, and *Dunning*, for the defendant.

The facts of the case, as reported by his Lordship, appeared to be as follow: The policy was on the ship the *Leghorn Galley*, "At and from *Leghorn* to *Jamaica*, with liberty to call at the *Windward Islands*; and from thence to *Liverpool*; warranted to sail from *Jamaica* on or before the first of *August* next." The ship had taken in her whole lading and papers, and set sail from the port of *Savannah la Mar* in *Jamaica*, on the 1st of *August*, and went to *Bluefields*, which is at the distance of about five miles, and is the general place of rendezvous for convoy. On the 25th of *July*, an embargo had been laid on all the ships in the island by the governor, and inserted in the public news-papers of that date. On the first of *August*, as soon as the ship had crossed the bar, going out of the harbour of *Savannah la Mar*, the captain returned in a boat, and there made a protest against losses or damages sustained, or to be sustained, on account of the embargo, which protest he could not have made at *Bluefields*. He then proceeded the same day over land to *Bluefields*. At that place the ship was detained till the 9th of *August*, when, convoy arriving, the embargo was taken off, and she sailed for *England* with the convoy, but was afterwards separated from it, and taken by an *American* privateer. The captain was examined at the trial, and admitted that he had heard of the embargo; but said, he thought it was only meant to prevent ships from departing without the protection of convoy; that he expected to meet with convoy at *Bluefields* on the 1st of *August*, and that the embargo would immediately cease, and leave him to pursue his voyage, the same day, without interruption.

In support of the verdict, it was insisted, that there had been a fair *bonâ fide* commencement of the voyage for *Europe*, on the 1st of *August*, which brought the case within the determination in *Bond v. Nutt* (2).

On the other side it was contended, that the captain, by sailing, when he knew of the embargo, had been guilty of a wilful breach of duty, and could not thereby acquire any right. There was no inception of the voyage by the departure from *Savannah la Mar*, as he knew he could not leave the island, on account of the embargo. This distinguished the present case from that of *Bond v. Nutt*, where the principle of the decision was, that there had been a *bonâ fide* departure from *Jamaica* within the meaning of the policy. Here the sailing was colourable, and merely intended to answer the letter of the insurance.

In

1780.

Case
against
HARRIS.

[358]

(2) B. R. E. 17 Geo. 3. stated *infra*, p. 352. col. 2.

1780.

EARLE
against
HARRIS.
[359]

In *Bond v. Nutt*, the captain had no such purpose in view, for he did not know of the insurance.

LORD MANSFIELD,—Whether there was a *bonâ fide* sailing on the 1st of *August*, or not, depends on the credit of the captain. He positively swore, that he expected to find convoy ready at *Bluefields* that day, in which case the embargo would have ceased immediately. The jury have believed him, and have found accordingly. I dare say the captain never heard of *Bond v. Nutt*.

WILLES, *Justice*,—It appears to me evident, from the captain's conduct, that he did not mean a sailing on the voyage. If he had intended to proceed directly, he had no occasion to quit his ship, in order to make the protest. Upon the whole, I think there was not a *bonâ fide* sailing on the first of *August*.

ASHHURST, *Justice*,—To be sure there ought to be a fair sailing; but the whole of the case has been before the jury, who have given credit to the captain. We must set aside the verdict as being against evidence, if at all, and I do not think there is ground for considering this as a verdict against evidence.

BULLER, *Justice*,—On the facts, as stated by my brother WILLES, I should have no doubt that the departure was colourable; but, from the report, it appears, that the captain thought he should find the convoy ready to sail immediately from *Bluefields*, and that the embargo would of course be taken off. If he had expected, and meant to wait for convoy, it would not have been a sailing on the voyage; but the question is mere matter of fact, and the jury having believed the captain, I think we must be bound by their finding.

The rule discharged (a).

(a) *Vide Theellsson v. Fergusson, infra, p. 361.*

Friday, 21st
April.

SAMUEL *against* PAYNE and Others.

A peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but a private individual cannot.

ACTION of trespass and false imprisonment, against *Payne*, a constable, and two others. The facts of the case were these: *Hall*, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search warrant was granted by a justice of peace upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found; however, *Payne*, *Hall*, and the other defendant, an assistant of *Payne's*, arrested the plaintiff, and carried him to the *Poultry Compter* on a *Saturday*, when no Alderman was sitting, by which means he was detained till *Monday*, when,

when, after examination, he was discharged. The cause was tried before Lord MANSFIELD, and a verdict found against all the three defendants. At the trial, his Lordship, and the counsel on both sides, looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate; but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by any body. His Lordship therefore left it to the jury to consider, whether any felony had been committed. The rule, however, was considered as inconvenient and narrow; because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorised to examine, and commit or discharge.

On this ground, a motion was made for a new trial, and, after cause shewn, the court held that the charge was a sufficient justification to the constable and his assistants, and cited *Ward's Case* in *Clayton* (a), 2 *Hale's Pleas of the Crown*, 84. 89. 91. and 2 *Hawkins*, B. 2. c. 12. and c. 13. [7].

The *Solicitor General* for the plaintiff.—*Dunning* for the defendants.

The rule made absolute [8].

(a) *Clayt.* 44. pl. 76.

[7] None of these authorities come exactly up to the present case, which is therefore the first determination of the point. In *Ward's Case*, (which is very loosely reported,) it would seem, that the goods had been actually stolen. The very point of this case had been agitated on a demurrer to a special justification, so long ago as the reign of Hen. 4. (*Tear-book* 7 Hen. 4. p. 35.

pl. 3.) and the court seems to have thought, that, if the cause of suspicion should appear reasonable, the justification would be good, though no felony were committed. But the case was adjourned [† 93].

[8] The new trial came on before Lord Mansfield, at the Sittings after this term, when a verdict was found against *Hall*, and for the other two defendants.

[† 93] *Vide* *Ledwich v. Catchpole*, B. R. E. 23 Geo. 3. ⚔ *Cald.* 291.

1780.

SAMUEL
against
PAYNE.

1780.

Friday, 21st
April.THELLUSSON *against* FERGUSSON.

A French ship being warranted to sail from *Guadaloupe* on or before the 31st of *December*, if she take in all her loading and papers, and leave her port of loading before that day, and sail to another part of the island, in the direct course of her voyage, and merely in the hopes of joining convoy, and to take the governor's dispatches for *France*, the warranty is complied with, though the governor there should detain her beyond the day, and although it was a condition inserted in one of her clearances, "that she should pass that way to take the orders of government." — An intention to deviate, if the ship is taken before the dividing point, does not vacate the policy.

[362]

THIS was an action on a policy of insurance, on the French ship *L'Aimable Gertrude*, "At and from *Guadaloupe* to *Havre*, warranted to sail on or before the 31st of *December*." It was tried before Lord MANSFIELD, at the last Sittings at *Guildhall*, when a verdict was found for the plaintiff.

On *Friday*, the 14th of *April*, *Bearcroft* obtained a rule for a new trial, which came on to be argued this day, by the *Solicitor General*, *Dunning*, and *Douglas*, for the plaintiff, and *Bearcroft* and *Lee*, for the defendant.

The evidence and facts of the case appeared, from his Lordship's report, to be as follows:

The ship took in her compleat lading and provisions for *France*, and all her clearances and papers, at a port called *Pointe a Pitre*, in the island of *Guadaloupe*, and sailed from thence on the 24th of *October*, for *Basseterre*, where there is no port, but only an open road. The town of *Basseterre* is the residence of the French governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and, to prevent it, took his ship's papers from him. At this place he was detained with his ship till the 10th of *January*, when he set sail with a convoy which had arrived some little time before, and being separated after some days from the convoy, the ship was taken by an *English* vessel. The captain, who was the only witness produced at the trial, swore, that notice had been given, on the part of the governor, some days before he sailed, to him and the other captains of ships at *Pointe a Pitre*, who were preparing to sail for *Europe*, that a convoy was expected from *Martinico* to be at *Basseterre*, by the 25th of *October*, and that, in consequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain his ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* some days beyond its time. The last ship-paper which he received at *Pointe a Pitre*, was *Le Role d'equipage*, or the muster-roll. This paper, which was much relied on by the counsel for the defendant, was dated the 24th of *October*, and was in the following words:

" Vu

"Vu par nous, chargé du détail des classes au départe-
 "ment de la *Grande Terre Guadeloupe*, l'équipage de-
 "nommé au rôle des autres parts au nombre de vingt
 "personnes, le capitaine compris. Permis au Sieur *Jean*
 "*Jacques Lethuillier*, commandant le navire *L'Aimable Ger-*
 "*trude du Havre*, de s'en servir pour faire son retour, au dit
 "lieu, passant a la Basseterre pour y prendre les ordres du
 "gouvernement, en observant les ordonnances & reglemens
 "de la marine. Fait a la *Pointe a Pitre*, *Guadeloupe*,
 "le 24 *Octobre 1778*. *Montenot*."

1780.
 THELLUS-
 SON
 against
 FERGUSON.

Under this there was written, on the same paper, an account, dated the 30th of *October*, of some changes in the number of the crew, and, under that, the following entry :

"Vu par nous, ecivain de la marine chargé du détail
 "des classes, les vingt cinq personnes existantes au pré-
 "sent rôle, le capitaine compris. Il est permis au Sieur
 "*Lethuillier*, commandant le navire *L'Aimable Gertrude*
 "*du Havre*, de faire son retour au dit lieu, en se confor-
 "mant aux ordonnances & reglemens royaux de la ma-
 "rine. A *Basseterre Guadeloupe*, le 2 *Janvier 1779*."

On another paper, called *Le Congé*, dated the 16th of *October*, which was read on the part of the plaintiff, there was written at the bottom, as follows :

"Vu de relache a la *Basseterre Guadeloupe*, pour y
 "attendre un convoi pour *France*. Ce 28 *Octobre 1778*.
 "*Monentheil*."

The captain swore, that he understood the only reasons for the condition in the muster-roll, that he should go to *Basseterre*, were, that the convoy was to be at that place, and that he might take such dispatches as were ready for *Europe*. He had not objected to it, because, in the regular course of his voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other course, except they were to keep quite to the leeward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, but would have sent his boat for the dispatches, but, having arrived at night, his ship had been detained, contrary to his intention and expectation.

The defendant's counsel, to invalidate the captain's testimony, besides the muster-roll, and the entry under it, as above stated, read the protest made by the captain on his arrival at *Dover*, (10th *March 1779*), and also his deposition in answer to the 29th interrogatory in the proceedings in the Admiralty, on the condemnation of the ship. The words of the protest on which they relied were as follow :

"Whereupon he, (the captain,) waited on the proper
 "officer at *Pointe a Pitre* for his muster-roll, and was an-
 "swered,

[363]

1780.
 THELLUS-
 SON
 against
 FERGUSSON,

"swered, it could not be granted, but on condition that
 "he should sail first to *Basseterre*, and *there wait* the direc-
 "tions of the general of the island."

And in a subsequent part :

Whereupon, at his, (the captain's,) instance, the said
 "John Nicholas Lethuillier, his father, came to *Basseterre*,
 "and went with Messrs, *Gobert* and *Boteul*, commissioners
 "of commerce, to the superintendant, and also to the
 "general of the island, stating to them, that the said ship
 "and cargo were insured upon condition that she should
 "have departed from the island of *Guadaloupe* before the
 "31st of *December* next, the terms of which insurance
 "they judged it essential to fulfil, notwithstanding which
 "they were still absolutely refused permission to depart,
 "and were kept there until after the said 31st of
 "December."

The deposition relied on was as follows :

"At the time the ship was first pursued and taken, she
 "was steering her course towards *Brest*. Her course was
 "not altered upon the appearance of the vessel by which
 "she was taken. Her course was at all times, when the
 "weather would permit, directed to *Brest*, for which port
 "he was directed to sail, although the destination was
 "for *Havre de Grace* by the ship's papers. She was *not*,
 "before nor at the time of the capture, sailing *beyond or*
 "*wide of Havre de Grace*. She was then about eight
 "leagues west of *Ushant*, and her course was not altered
 "to any other port or place, but was obliged to be directed
 "to *Brest* in consequence of the orders he had received,
 "subsequent to the delivery of the ship's papers."

In answer to the 27th interrogatory, his deposition was,
 "That all the ship's papers found on board were true and
 "fair, and none of them false and colourable."

At the trial, the captain swore, that he had received the
 directions to keep in the course to *Brest* at *Basseterre* from
 his father, who had formerly commanded the ship, but
 that this was done as the safest way, in time of war, of
 getting to *Havre*, which *still continued to be the place of the*
ship's destination.

The grounds of the application for the new trial were
 two : 1. That there had been no inception of the voyage
 on the 24th of *October*, nor till after the 31st of *December* ;
 2. That the ship never sailed on her voyage insured, *via*,
 from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe*
 to *Brest* — 1. This case was said to be very different from
 that of *Bond v. Nutt* (c), which had been relied on at the
 trial by the counsel for the plaintiff, because, here, the per-
 mission to leave *Pointe a Pitre* was conditional. The cap-
 tain had no election ; he was bound to go to *Basseterre*, and
 the

[364]

the time of his departure from thence was at the disposal of the governor. Till his orders were received, he could not proceed to *Europe*, and, as he had not been permitted by the governor to depart till long after the day in the warranty, the voyage had not commenced till after that day. The words of the *muster-roll*, as delivered at *Pointe a Pitre*, were materially different from those of the ultimate and unconditional permission to sail, which he received at *Basseterre*. It was manifest from the language of the protest, that he himself did not consider the voyage as begun, because, if he had, he would not have stated to the governor, that his departure from *Basseterre*, before the 31st of *December*, was essential towards fulfilling the terms of the insurance. The act of the captain in *Bond v. Nutt* was voluntary, and he proceeded by the way of *Bluefields* as the best and safest course he could take for the interest of the concerned. A *bonâ fide* and complete inception of the voyage they admitted to be sufficient, even although the force of an embargo, or any other compulsion, should oblige the ship immediately to stop, or put back. This had been the case in a cause between these very parties, which had been tried before Lord MANSFIELD, immediately after *Bond v. Nutt*, and also in the very recent case of *Earle v. Harris*—2. The deposition above stated was relied on as evidence, that the ship had never sailed on the voyage insured; that she left *Guadaloupe* on a voyage to *Brest*, not to *Havre*; and there, independent of the other point, the plaintiff was not entitled to recover.

For the plaintiff, it was said,—On the *first* point, that this case was not so strong as *Bond v. Nutt*, because *Bluefields* was out of the straight course of the voyage in that case, whereas here *Basseterre* was in the direct way to *France*, so that the captain must have gone by that place, at all events, and although there had been no such words in the *muster-roll* as those relied on by the defendant's counsel. The only purposes for which those words were inserted were, that he might be sure of convoy, which was *expected* to be at *Basseterre*, and to carry any government dispatches that might be ready. The voyage to *Europe* was not less commenced on that account; and the opinion the captain or his father might entertain on the meaning and construction of the contract of insurance, as disclosed by the depositions, could not alter the legal import of the policy.—On the *second* point, it was insisted, that the voyage was not to *Brest*, but to *Havre* by the way of *Brest*, that being the safest course. A ship loaded with merchandize, (as this was,) could never be destined for *Brest*, which was not a place of trade. But, at most, if the design had been to go from *Basseterre* to *Brest*, still, as the ship had certainly sailed from *Pointe a Pitre* for *Havre*, the voyage to *Brest*

1780.

THELLUS-
SON
against
FERGUSSON.

[365]

was

1780.

THELLUS-
SON
against
FERGUSSON.

was only a deviation intended, but never carried into execution; for, when the capture took place, she had not gone out of the direct course to *Havre*. That an intention to deviate, not carried into effect, does not vacate a policy, had been established by several solemn determinations (d).

LORD MANSFIELD, — 1. In my apprehension, there is no contradiction between the parol evidence and the protest and depositions. The captain had never heard of the case of *Bond v. Nutt*. Under an insurance at such a place as *Guadaloupe* or *Jamaica*, the ship is protected in going from port to port in the island. But the question here is, whether the voyage was, *bonâ fide*, commenced, and was stopt by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain, when he left *Pointe à Pitre*, expected to meet with convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre* at any rate, independent of the clause in the muster-roll. — 2. With regard to the second point, the voyage to *Brest* was, at most, but an intended deviation, not carried into effect. I think there should not be a new trial.

[366]

WILLES, and ASHHURST, *Justices*, of the same opinion, BULLER, *Justice*, — The case in 1777, between the same parties, is in point. There was no embargo there, nor in the present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which I think there was in this case. The ship was completely ready in all respects.

The rule discharged [9].

(d) *Foster v. Wilmer, Carter v. The Royal Exchange Assurance Company, &c.* cited *supra*, p. 17.

[9] There were actions against twenty other underwriters upon this policy, depending at this time. Nineteen of whom, after the rule in this case of *Thellusson v. Fergusson* was disposed of, not being satisfied with the decision, obtained leave to consolidate their different causes, upon the usual terms of being bound by one verdict, and not bringing a writ of error. The twentieth (*Pigou*) did not choose to enter into the rule. At the ensuing sittings therefore two actions were entered, *Thellusson v. Staples*, the underwriter against whom the plaintiffs had elected to try, (the option in such cases being with the plaintiff,) and *Thellusson v. Pigou*. *Thellusson v. Staples* stood first. The second point was now abandoned. On the first, the

same evidence was given as at the former trial, the captain being still the only witness called. *Beacroft*, in his opening for the defendant, insisted upon it, as a proposition not to be controverted, that "To constitute a sailing within the meaning of the warranty in this policy, the vessel, at the time of her sailing from the port of loading, must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line if it were possible." He said, that was the case in all those causes to which the present was supposed to bear a resemblance. Lord Mansfield summed up to the jury, to the following effect, — The single question on this policy is, Whether the ship sailed on her voyage to *Havre* before the 31st of December. She certainly sailed from *Pointe à Pitre* completely loaded

loaded before that time. The doubt, on the first question of this sort*, was this: the policy was "at and from Jamaica;" now the word "at" certainly comprizes the whole island, and, under that word, you may sail from one port to another every where along the coast of the island. The ship, therefore, in that sense, was still at Jamaica after she had got to Bluefields. She did not leave Bluefields till after the day named in the warranty, and that place was quite out of the course of navigation from * *St. Anne's* to *England*. I own, at the trial, I thought the voyage to *England* did not commence till the ship sailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wished, (as I always do in such cases) that the opinion of the court might be taken, in order to settle the point. The case, when it came on in court, was very ably argued; I was completely convinced; and the court unanimously of opinion, that the voyage to *England* began when the ship sailed from *St. Anne's*, and, upon the second trial, the plaintiff had a verdict. *Earle v. Harris* was still a stronger case. There, an embargo was actually published before the ship sailed, and the captain immediately, after crossing the bar, returned to make a protest and sent his ship knowingly into the embargo; but he swore he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage; and the jury believed him. In this case, to go by reports, there was public notification of a convoy to be at *Basseterre* on the 5th of October. The captain thought he might be stopped a day or two at *Maricao*, and that he should get to *Basseterre* in time. He worked night and day, paid double fees for his papers, and sailed with full expectations of pursuing his voyage directly. He knew of no embargo, and

case differs strongly from *Bond v. Nutt*. He was even in the regular voyage obliged to pass under the cannon of *Basseterre*. He had his muster-roll on condition of calling there.

But he made no difficulty of taking it on that condition, because he knew he must pass that way at all events. Did he not, *bona fide*, begin his voyage? He certainly had no idea, when he sailed from *Pointe à Pitre*, of meeting with any stop. So it was in the former case of *Thellusson v. Fergusson*. There was no idea of the embargo in that case when the ship sailed. Here, there is not the least suspicion of fraud. The captain certainly did not know of the determination in *Bond v. Nutt*. He thought, when he was detained at *Basseterre* beyond the 31st of December, that the policy was forfeited, which is a strong circumstance in the plaintiff's favour, for it shews that the sailing was not colourable. This question has undergone the consideration of a special jury, and of the court. Underwriters have a right to litigate questions which seem to them to be in their favour. But, at last, there should be an end of litigation. If you should be of the same opinion with the former jury and the court, you will find for the plaintiff—A verdict was accordingly found for the plaintiff, and immediately afterwards the counsel for *Piogu* agreed that one should also be entered, by consent, against him.

As in these causes, as well as in *Earle v. Harris*, *Bond v. Nutt* was very much referred to, and, ever since it was determined, has been considered as a leading case in the law of insurance; it will not be improper to subjoin an account of it in this place [† 94]. It was tried before lord MANSFIELD at *Guildhall*, at the Sittings after *H. 17 Geo. 3*. The policy was effected, (on the ship *Capel*), on the 20th of August 1776, and was in these words: "At and from *Jamaica* to *London*,"

1780.
THELLUS-
SON
against
FERGUSSON.

* In *Bond v. Nutt*.
Vol. I.

[† 94] Since reported, *Corp.* 601.

1780.

THELLUS-
SON
against
FERGUSSON.

"warranted to have
 "failed on or before
 "the 1st of *August*
 "1776, to return 5
 "per cent. if the ship
 "departed with con-
 "voy, or 8 per cent.
 "if with convoy for
 "the voyage (*f*) and arrived." The
 first and second counts in the declara-
 tion averred, "That the ship failed
 before the 1st of *August*, viz. on the
 20th of *July*, from *St. Anne's Bay* at
Jamaica, when she had been loaded,
 and had taken in her cargo for the said
 voyage, (*i. e.* from *Jamaica* to *Lon-*
don), ready to perform the said voyage,
 and proceeded to *Bluefields* for the pur-
 pose of joining convoy there, which
 was then about to sail for *Great Bri-*
tain." The third count stated, "That
 she failed before the 1st of *August*, viz.
 &c. from *Jamaica* aforesaid, on her said
 voyage." It was admitted by the de-
 fendant, that the ship had taken in her
 complete lading and clearances for
England, and had sailed from *St. Anne's*
Bay, on the 26th of *July*, on purpose
 to join the convoy there, and proceed
 to *England*; that she arrived at *Blue-*
fields on the 28th or 29th of *July*, when
 she was detained till beyond the day in
 the warrant, in pursuance of a procla-
 mation from the governor and council
 of *Jamaica* for a general embargo;
 that, afterwards, having had sailing or-
 ders, she proceeded with the convoy
 for *England*, and, on her passage, be-
 ing separated from the convoy, was
 taken by an *American* privateer. *Blue-*
fields was the usual place of rendezvous
 of the king's ships and convoy on the
Jamaica station, but the greatest part
 of the course from *St. Anne's* to *Blue-*
fields was out of the direct road to
England. A verdict having been found
 for the defendant, the case was argued
 on two several days, by *Dunning*, and
Buller, for the plaintiff, and *Wallace*,
 and *Baldwin*, for the defendant. The
 two points made for the defendant
 were: 1. That there was no departure
 till after the day in the warranty:
 2. That if there was, the going to

Bluefields was a deviation. After the
 first argument, Lord MANSFIELD,
 said it seemed to be a new question,
 whether a ship going expressly for the
 purpose of getting convoy, out of the
 course of the voyage, is to be con-
 sidered as in the prosecution of the voy-
 age insured, or whether this is a depa-
 tation. He therefore directed that the
 cause should stand over to look for cases
 on that subject

The general scope of the argument
 for the plaintiff, was as follows:

1. It was urged at the trial, by the
 defendant's counsel, that it is the prac-
 tice of ships in the *West-India* trade to
 sail from port to port for the purpose of
 taking in different commodities, and
 till they finally depart from
 the last port, they still are [368]
 considered as continuing at
 the island; but, in this case, the ship
 had completed her cargo, had all
 her papers on board, and had nothing
 further to do at *Jamaica*. It was said,
 that, if she had sailed from *Jamaica*,
 the embargo never could have reached
 her to stop her voyage; but that pro-
 position is not a clear one. If she had
 not sailed so far as to be beyond the
 reach of the guns, she would have been
 compelled to return, and, in fact,
 many ships of this fleet were forced
 back after they had sailed. 2. If there
 was an inception of the voyage on the
 departure of the ship from *St. Anne's*
 her going to *Bluefields*, for the express
 and sole purpose of meeting with con-
 voy, was no deviation. To be sure
 as *Bluefields* is on the opposite side
 of the island, and out of the direct course
 there was an actual deviation; but if
 it was for a justifiable reason, it was no
 deviation in the sense in which the warranty
 is used when applied to insurances.
 Whenever a ship does what is bene-
 ficial to all the parties interested, it is as
 much within the meaning of the policy
 as if expressed in words. A deviation
 which vacates the policy, must be
 something injurious to the underwriter,
 something which exposes him to a loss
 which he did not mean to insure. There
 was no occasion for any particular

clause in the present policy specifying that the ship might go to *Bluefields* to join the convoy. The underwriters knew, and it must have been understood by all parties, that *Bluefields* was the place of rendezvous. It is no port; no motive of trade occasioned the ship's going there; and, to decide whether a departure from the direct course of a voyage, is in law a deviation, the object of such departure, its tendency, and effect must be taken into consideration. In the case of *Motteux v. The London Assurance Company* (g); the insurance was from *Fort St. George* in the *East-Indies* to *London*; but the ship, on her arrival at *Fort St. George*, being leaky and unable to proceed for *Europe* without repairs, she went back all the way to *Bengal* for the purpose of being repaired. Yet, as this was thought necessary for the interest of all concerned, and was not done for any purpose of trade, the underwriters were held to be liable, although nothing was said in the policy about leave to go out of the insured course for the sake of repairs. Here, in like manner, the deviation was necessary, and not for the sake of trade. The same reason applies to every case where the act is for the benefit of all concerned. Suppose the ship, in the course of her voyage, were to find herself on the point of falling into the midst of a fleet of privateers; surely she would be warranted in going as far to the right or left as should be necessary to avoid the danger of capture. In all the reported cases of deviation for the sake of convoy, (which are but two or three,) there was, it is true, an express warranty to depart with convoy, viz in *Bond v. Gonfales* (h), *Gordon v. Morley* (i), and *Stevenson v. Snow* (k); but, in the present case, there is what is tantamount to such a warranty. The

premium was to be lessened if the ship should sail with convoy. That event therefore was manifestly in the contemplation of the contracting parties, and was provided for in the contract; and the ship could not depart with convoy without going to *Bluefields*. In the other cases, if the ship departed without convoy, the underwriters were not to be liable at all. In the present, they were to continue liable, but it was to be in a less degree. There is therefore a literal difference; but, as to the question now before the court, the former cases agree in principle, and substance, with the present. In the case of *Pelly v. The Royal Exchange Assurance Company* (l), the whole doctrine on the subject of the present question was very fully discussed at the bar, and by the court. It was there stated in the case, as a material fact, that what was done was prudent, and for the general benefit of all persons concerned in the safety of the ship. The argument and decision went, 1. upon the acts being in the usual [369] course, and, therefore, such as must have been in the knowledge of the underwriters, and that what it is known must be done is as much covered by a policy as if it were expressly mentioned (m); and, 2. upon its being found to have been *ex justâ causa*, and for the general benefit (n). These principles are perfectly applicable here. The master looked at the same end; the safety of the property insured. There, the ship was to be refitted, which was necessary for her safety. Here, she was to be protected against enemies and pirates. In short, nothing was done which the insurers, if

1780.

THELLUS-
SON
against
FERGUSSON.(g) *Canc.* 6 Dec. 1739 1 *Atk.* 545.(h) *At N. Pr.* 14 Feb. 1704. Before *Holt. Ch. J.* 2 *Salk.* 445.(i) *At N. Pr.* H. 20 Geo. 2. before *Le, Ch. J.* 2 *Str.* 1265.(k) *B. R. M.* 2 Geo. 3. 3 *Burr.* 1237. *Butler* also mentioned a case of*Le Fevre v. Bradshaw, C. B. H.*

3 Geo. 3. of the same sort.

(l) *B. R. E.* 30 Geo. 2. 1 *Burr.* 341.*Tierney v. Etherington* there cited, 1 *Burr.* 348.(m) 1 *Burr.* 350.(n) 1 *Burr.* 351.

1780.

THELLUS-
SON
against
FERGUSSON.

if they had known and been consulted, would not themselves have directed. It may be said, that the word *necessity* is used in some of the cases, and that here no necessity existed.

To be sure there was not any physical necessity, but there was a necessity in the sense in which the word is made use of in those other cases. The risk was diminished in a much greater proportion, by the sailing with convoy, than was counterbalanced by the stipulated return of premium.

The arguments for the defendant were to the following effect.

The parties did not know from what part of the island the ship would sail, and, therefore, they insured *at and from Jamaica* in general. *Bluefields* is as much in *Jamaica* as *St. Anne's*; and the ship was certainly protected under the word "*at*" in going from the one place to the other. But the underwriters would not insure the voyage home unless she should have departed by a certain day. This was the very foundation of the contract, and the reason was, because the risk is greater, and the premium rises of course, if the ship continue longer, so as to be exposed to the tempestuous weather in the end of the year. The argument from the return of premium to be made in case of sailing with convoy is a fallacy. The underwriters only meant that if the ship should, within the time specified, depart under that protection from the war-risk, they would, in such case, insure the voyage for a smaller consideration. The case is very different when there is an express warrant to depart with convoy, for then, as the party insuring must be supposed to know where the convoy will be stationed, the ship is, from the nature of the thing, insured from the port of loading to the rendezvous for convoy. The argument for the plaintiff would have held equally if the captain, having gone to *Bluefields*, and not having found convoy there, had remained voluntarily waiting for convoy till long

after the day stipulated, and when the dangerous hurricanes had begun. How can the insured, or this court, say, that the underwriter shall be obliged to consider it as more for his interest that the ship should sail later in the season but protected from capture, than earlier, and less exposed to tempest, but more to the danger of capture? If the ship had been disabled by a storm at *St. Anne's* and kept till the 2d of *August*, the underwriters would not have been liable.

LORD MANSFIELD.—I am glad this case has been so fully and ably argued. It comes on by the candour of the parties, in the fairest way. After the verdict was brought in, the foreman told me, that at least 100,000*l.* depended on it. Some things are very clear. The policy was made on the 20th of *August*, on the contingency of a fact, which must have happened one way or the other, before the making of the contract, and which nothing that has happened since could alter. The port from which the ship was to sail, was, if I may use the expression, the whole island of *Jamaica*. The words "*at Jamaica*" in the policy mean from port to port. It is a question of fact whether she sailed from *Jamaica* before the first of *August*. There is no latitude, no quality, no construction that can supply the place of that fact. Certainly if she had been detained at *St. Anne's* beyond that day, though by proper reasons,—as for necessary repairs, tempestuous weather, to avoid an enemy &c.—the insurance on the voyage home would have been at an end. On the other hand, if she had broken ground on the voyage from *Jamaica*, and had been put back by storm, an embargo, or an enemy, and had then been under a necessity of staying till *September*, still there would have been a sailing within the meaning of the contract. This was the fact in another case, (*The Bellusson v. Fergusson*), tried before me immediately after the present. The ship *Hero* was warranted to sail from *Grenada*, between the 1st of *January* and the 1st of *August*. On the 1st of *August* she had just got under

fail; (having all her cargo and clearances on board,) when an embargo was laid on, and the Captain told he would be fired upon from the fort if he proceeded. He therefore stopped, and was detained beyond the day. I held this to be a departure. A verdict was found for the plaintiff, and there has been no motion for a new trial*. The whole question turns upon this; did the voyage from *Jamaica* begin from *St. Anne's* or from *Bluefields*? When a voyage is once begun, the going a little out of the way may be a benefit to all concerned, and therefore no deviation. Another point very material here is, what as the ship was protected during her stay at *Jamaica*, she had a right to go to *Bluefields*, or all round the island. If the insurance had been at and from the port of *St. Anne*, warranted to fail on or before the first of *August*, the case might have been different. The court wishes to consider this case farther, and to give such an opinion on the real merits as may direct the judgment of the persons interested in all the causes depending on this policy.

Aston, Justice,—I am glad the court takes time to consider. At present it appears to me to be a mere question of fact, whether the ship sailed, *bonâ fide*, from *Jamaica* on or before the first of *August*. It is a different case from deviations occasioned and excused *ex justa causa*, such as storm, avoiding an enemy, &c. Here did the ship sail from *Jamaica* when she left *St. Anne's*, or only when she left *Bluefields*? If she had gone to *Bluefields* to join the convoy, and had not met with any, she could not have staid there to wait for it.

Willes, Justice,—The question is

certainly a question of fact, and for the decision of the jury. If the ship had found no convoy at *Bluefields*, she must have proceeded, or, having found convoy, if she had been detained there waiting for other ships, this would have exempted the underwriters.

Some days afterwards, Lord MANSFIELD delivered the opinion of the court as follows.—Upon consideration of all the circumstances of this case, we are satisfied that the voyage from *Jamaica* to *England* began from *St. Anne's*. On sailing, the ship had no object but to make the best of her way to *England*, she touched at *Bluefields* only as being the safest way she could take. It is manifest, from the value of the property depending on this trial, that it was considered by all the other shipping as the safest measure to be observed, and that the contrary would have been unwise and imprudent. The great distinction (and on which we found our opinion) is, that she left *St. Anne's* for *England*, with her cargo, papers, master, &c. on board, and did not sail to *Bluefields* as a distinct port. If she had gone there for any purpose independent of the immediate prosecution of her voyage, as, for instance, to take in water, letters, or even to wait for convoy, none being there, that would have made a great difference; there would then have been a coasting voyage to *Bluefields*, and another from thence to *England*. But here we think the only object was to take the safest course to *England* from *St. Anne's*.

The rule made absolute.

* The question, in *that* cause of *Thelwell v. Fergusson*, came on in the form of an action for a return of premium. There were two policies; one with a warranty that the ship should sail on or before the first of *August*; the other, which was made afterwards to provide for the event of her not sailing on or before the first, contained a warranty

to sail on or after the second of *August*. The ship, after she had been forced back, obtained leave to sail again on the third, which she did, and arrived safe, upon which the insured brought this action against the underwriters on the second policy, on the ground that the risk insured by them had never commenced.

1780.
THELLUS-
SON
against
FERGUSSON.

1780.

Saturday, 22d
April.

To make a man liable as a partner, there must either be a contract between him and the ostensible person to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself.

HOARE and Others *against* DAWES and Another.

THIS was an action for money lent and advanced, which was tried before Lord MANSFIELD, at the last Sittings at Guildhall (a), and a verdict found for the defendants. On Friday, the 14th of April, the Solicitor General obtained a rule to shew cause why there should not be a new trial; and, this day, the case came on to be argued; when the facts appeared, from his Lordship's report, to be as follow:—The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the *East-India* Company to Contencin a broker who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the *East-India* Company's sale, of which they, (together with himself,) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the Company to give a warrant or warrants to the broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale, 25*l.* per cent. is advanced, and is forfeited, unless the whole is paid on the third, which is the last day of payment. If paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally considerably less than the supposed value of the tea. It happened, however, in this instance, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India* House, that the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead, or become bankrupts. The shares of the defendants were to be two sixteenths of the whole lot.—The ground of the action was, that all the employers of the broker were to be considered as partners and jointly and severally liable for the whole. The defendants owed nothing upon their own two sixteenths. There was not any joint concern in the re-disposal of the tea. The defendants produced several bankers and brokers, (of whom Contencin was one,) who said, they had had frequent transactions of this sort, (it being a very usual speculation, and they always understood, that the only security was the pledge, and the personal security of the broker, unless

[372]

(a) Friday, the 3d of March 1780.

where the principals were enquired after, and declared, which was very rarely done. That, as the practice was to advance considerably under the supposed value of the tea, and it was also usual to stipulate, that, if the money was not repaid within a certain time, the lender might sell, the warrant was of itself a general and sufficient security.

Contestini said, that tea-warrants were considered as cash, and passed by delivery. On the other side, in answer to this evidence, (the plaintiffs having, at first, rested their case on the fact, that there were persons behind the curtain, for whom the broker acted,) two witnesses were called. One of them, one *Cartony*, a tea-dealer, swore, that a broker had once borrowed some money for him on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the sum advanced, and the broker having failed, he had paid the difference, considering himself as liable. The other was a person who had also dealt in tea, and in loans of this sort, and he swore, that his idea had always been, that the persons behind the curtain were liable; but, upon cross-examination, he said, he never knew any loss happen, nor any demand actually made, on the broker's employers.

Lord MANSFIELD said, when the rule was moved for, that he was very glad the motion had been made, that the question might be re-considered. That, at first, at the trial, he was of opinion with the plaintiffs, thinking this was a case of sleeping partners, but that, before the end of the cause, he was very clear, that the different employers were only liable for their own shares.

The *Solicitor General*, *Dunning*, and *Davenport*, for the plaintiffs:—*Bearcroft*, *Lee*, and *Wood*, for the defendants.

Lord MANSFIELD,—I considered this, at first, as a case of dormant partners. The law with respect to them, is not disputed, viz. that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but, towards the end of the cause, the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, because he said the broker borrowed the money for him; and, besides, he did not dispute the demand. Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery, like *East-India* bonds. These warrants are pawned with the lender, but the broker has no

1780.

HOARE
against
DAWES.

[373]

1780.

HOARE
against
DAWES.

power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference, whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous, if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni.* The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; they did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make 500 persons partners, who had never seen nor heard of one another, or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants.

The rule discharged [C].

[C] *Vide Coope v. Eyre, C. B. T.* with costs, the Lord Chancellor being of opinion, that it was merely a question of law. *Hoare v. Contencin, Cam. H. 19 Geo. 3. 1 Br. Ca. in Ch. 27.*

[374]

Monday, 24th
April.

THE COMPANY OF CARPENTERS, BRICK-MAKERS, BRICKLAYERS, TYLERS, and PLAISTERERS, &c. of Shrewsbury against HAYWARD.

To prove the existence of an aggregate corporation consisting of different trades, en-

tries of admissions into the *separate* trades, as "into the company of carpenters, "into the company of plaisterers, &c." are evidence to be left to a jury.—A person who has acted in breach of an alleged custom is not a competent witness to disprove the existence of the custom.

THIS was an action on the case, against a carpenter, for the breach of a custom, which was laid to be, That none but members of the company, (being a corporation by prescription,) or their apprentices, or journeymen, should exercise,

exercise, in *Shrewsbury*, or within a certain district round that town, any of the trades mentioned in the title of the company. The cause was tried at the last assizes for *Shropshire*, before HEATH, *Serjeant*, and a verdict found for the plaintiffs. On *Thursday*, the 13th of *April*, *Howorth* obtained a rule to shew cause, why a nonsuit should not be entered, or a new trial granted; and the case came on to be argued, this day, by *Bearcroft*, for the plaintiffs, and *Howorth*, for the defendant.

1780.

The Com-
pany of
CARPEN-
TERS, &c.
against
HAYWARD.

1. The ground for the nonsuit was, that the plaintiffs had not proved the existence of such a company as that described on the record. The evidence on this head consisted of entries of admissions, (some as far back as the reign of *Henry 8.*) of persons, some into the *carpenters'* company, some into the *bricklayers'* company, some into the *plasterers'* company, &c.; of instances of fines paid for having worked in those trades, without being free of the *carpenters'* company, of the *bricklayers'* company, &c.; and of the testimony of one witness (who was only twenty-four years of age) who said, he had been employed to call meetings of the company, and that they were called by the aggregate name stated in the declaration. The Judge told the jury, that the companies might be distinct corporations for some purposes, and yet form but integral parts of one great corporate body; that such a corporate body might legally exist; and whether, in fact, it did exist, was a question for their decision. For the defendant it was objected at the trial, and now, that the evidence given was only proof, at most, of separate incorporated companies, there being no instances of admissions into the aggregate body; no common seal; nor any proof of any corporate parole act done by them. The evidence of the witness was said to be of so recent a nature, that it ought not to have had any weight. 2. The ground for a new trial was, that a competent witness was rejected, who was offered on the part of the defendant, and that many others of the same description were ready to have been produced. The witness rejected was resident in *Shrewsbury*, and was called to prove, that he had worked without molestation as a carpenter in *Shrewsbury*, although he was not free of the company, nor an apprentice or journeyman. The Judge thought the witness was incompetent. For the defendant it was contended, that he was not interested in the cause, and that if the sort of interest he might have could render him incompetent, there could be no such thing as a disinterested witness in such a cause, the only persons likely to know the facts applicable to the case, being either persons who had worked themselves in breach of the supposed custom, or who had employed others; and, if the first class were considered

[375]

1780.

The Com-
pany of
Carpen-
ters, &c.
against
Hayward,

considered as interested, because liable to be sued, the same objection might be made to the second.

The court thought it unnecessary to hear the counsel for the plaintiffs.

LORD MANSFIELD,—1. It was properly left to the jury to consider, whether the evidence produced was sufficient to shew, that there was such a company; for that was a mere question of fact; and they were to decide on its existence, and whether it was originally created by a charter from the crown, or was only a voluntary society. There was evidence of its existence as a corporation. 2. The witnesses rejected were clearly interested in the question. If the company had failed in establishing the custom, they would have been discharged from actions to which they are liable for the breach of it.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—1. Whether there be any evidence, is a question for the Judge. Whether *sufficient* evidence, is for the jury. 2. The objection to the witness produced for the defendant was certainly decisive; nor is it true, that he could have had no other sort of witnesses. The employers might have been witnesses.

The rule discharged.

[376]

EDDOWES, and Another, *against* HOPKINS, and
Another, Executors of HARRIS.

Where there is a general verdict on a declaration consisting of different counts, some of which are inconsistent, or had in point of law, and evidence has only been given on the good or consistent counts, the verdict may be amended by the judge's notes.

ASSUMPSIT, tried before LORD MANSFIELD, at Guildhall, at the Sittings after last Michaelmas Term. The declaration contained several counts; some upon promises made by the testator, others on other promises by the defendants themselves. To the first set of counts *plene administravit* was pleaded, and the general issue to the others; and, the jury having found for the plaintiffs with 147*l.* damages, a general verdict was entered by the officer.

At the trial, the only question was, whether the plaintiffs were intitled to interest on the value of goods sold by them to the testator. They were wholesale linen-draper, and the testator an American merchant, and it appeared to have been the usage of the American trade, for merchants here to allow to their American correspondents twelve months credit, and then to charge them five *per cent.* for interest, and for the tradesmen here, to allow the merchant fourteen months credit, and then to charge five *per cent.* This was hardly disputed by the defendants, and his Lordship held, that though by the common law, book debts do not of course carry interest, it may be payable in consequence

quence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it [C]. But none of the articles for which the testator was indebted to the plaintiffs had been delivered *fourteen months before his death*, so that no interest was owing when he died, and the defendants contended that the usage did not bind the executors. Lord MANSFIELD, however, and the jury, thought otherwise.

In the last term, the *Solicitor General* obtained a rule to shew cause, why the judgment should not be arrested, on the ground that the verdict was general, and the counts inconsistent, and such as require different judgments to be entered, viz. judgment *de bonis testatoris* on those where the promises were laid to be by the testator, and *de bonis propriis* on the others.—Some time afterwards, *Baldwin*, for the plaintiffs, obtained a cross rule, for the defendants to shew cause, why the *poslea* should not be amended by the Judge's minutes, and a verdict entered for the plaintiffs only on the counts to which the evidence given at the trial applied, and for the defendants on the others.—Both these rules came on to be argued this day.

The *Solicitor General*, for the defendants, insisted, that if the court were to alter the *poslea*, they would, in fact, do what was properly and exclusively the province of the jury, for that the verdict would then be the act of the court.

Lee, for the plaintiffs, contended, that this was not a new sort of application, and cited a case of *Newcombe v. Green*, in *Strange (p)*, where it appeared by the Judge's minutes that the jury had found for the plaintiff with 274*l.* 11*s.* damages, but the officer only entered a verdict with 1*s.* damages, and the court directed an amendment to be made according to the Judge's minutes [11].

Lord MANSFIELD said, it was impossible to believe there was such an absurdity in the law, as that a mere mistake of the officer should be without a remedy, and that neither the judge nor jury could possibly have proceeded on what there was no evidence of before them: and he mentioned a case of one *Gibson* who had been tried for robbing Mr. *Francis*, and convicted, and a mistake being discovered in the verdict, upon consultation with all the

1780.

EDDOWES
against
HOPKINS.

[377]

[C] *Vide Orr v. Churchill*, C. B. E. 29 Geo. 3. H. Bl. 227. 232.

(p) B. R. M. 17 Geo. 2. 2 Str. 1197.

[11] *Vide Maye v. Archer*, B. R. E. 8 Geo. 1. 1 Str. 513. 515. where a venire de novo was moved for, on an affidavit, that certain facts, which the

court thought material, but which were not found in the special verdict, were proved at the trial: but the court directed the verdict to be amended in that respect. *Vide also Bois v. Bois*, B. R. T. 16 Car. 2. 1 Lev. 134.

1780.

EDDOWES
against
HOPKINS.

the Judges at his chambers, it was corrected from minutes signed by the jury, and the prisoner executed.

BULLER, *Justice*, said, there was this distinction, that, if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the Judge, and entered only on those counts; but that, if there was any evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the *Posse* could not be amended, because it would be impossible for the Judge to say, on which of the counts the jury had found the damages, or how they had apportioned them: That, in such a case, the only remedy is by awarding a *venire de novo* [12]. He mentioned an instance where Sir *Fletcher Norton* had moved for and obtained a *venire de novo*, in a case of that sort [13].

[378]

The rule to arrest the judgment was discharged, and the other rule made absolute; but, on the payment of costs, including those of the motion in arrest of judgment.

[12] *Vide Auger v. Wilkins*, B. R. be according to an ancient rule of court. *M. 6 Geo. 2. Barnes*, quarto edition, [13] *Vide Grant v. Affle*, T. 21 G. 3. 478. where this was done, and said to *infra*, 722.

Thursday,
27th April.

BLACQUIERE and Others, Assignees of SAMPSON and Another, Bankrupts, against HAWKINS, Assignee of WOOLDRIDGE, a Bankrupt.

A prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings.—The court takes notice of such customs of London as appear to have been certified by the recorder.—Inferior courts cannot grant a new trial.

ON a motion for a prohibition to the Mayor's Court in London, the case appeared to be this: *Wooldridge* and *Kelly* were indebted to Messrs. *Sampsons* to the amount of 4000*l.* and, the *Sampsons* having become bankrupts, the plaintiffs were chosen assignees under their commission, in which character they brought an action of debt in the Mayor's Court against *Wooldridge* and *Kelly*, (the first of whom was also a bankrupt, and the defendant *Hawkins* his surviving assignee). The serjeant at mace, to whom process was directed to summon *Wooldridge* and *Kelly* to appear, returned that they had nothing within the city or liberties, by which they could be summoned, nor were to be found within the same, "and they being solemnly called, did not appear, on which the plaintiffs alleged, that the defendant owed to *Wooldridge* and *Kelly* the sum of 4000*l.* and then had the same in his hands as their proper

proper money, and therefore prayed process against him, to attach him by the said 4000*l.* that he might appear in that court, and thereupon they proceeded by way of foreign attachment against him. The defendant pleaded that he had no money of *Wooldridge* and *Kelly* in his hands; and the cause being tried before *Glynn*, Serjeant, then recorder of *London*, it appeared in evidence, that 1041*l.* 10*s.* 2*d.* belonging to the partnership estate of *Wooldridge* and *Kelly*, was in the hands of the defendant, but that it came to him as the assignee of *Wooldridge* under the commission, so that he was only a trustee for *Wooldridge's* creditors at large; on which ground it was contended, at the trial before the Recorder, that this being trust-money, was not the subject-matter of a foreign attachment. A verdict however was found, and judgment entered, for the defendant, for the 1041*l.* 10*s.* 2*d.* and execution awarded. These facts were set forth in the suggestion. Before this application for a prohibition, the defendant had moved for a new trial, and in arrest of judgment, in the Mayor's Court, but without success. *Adair*, Serjeant, who had succeeded *Glynn* as Recorder, refused the new trial, because there was no report of the evidence, by his predecessor, and because it had, he said, been settled that an inferior court can only grant a new trial on the ground of surprise in obtaining the first verdict, which was not pretended in this case.

On *Thursday*, the 20th of *April*, the *Solicitor General* and *Sylvester* shewed cause.—They contended, that the application came too late, for that, after sentence or judgment, the court will never grant a prohibition, unless the want of jurisdiction in the inferior court appear on the face of the proceedings themselves. For this, they relied on *Argyle v. Hunt*, in *Strange* (q). Here, they said, the objection was founded on matter *dehors* the proceedings. If, in this case, the defendant had thought the facts did not support the attachment, he might have rendered a bill of exceptions at the trial, but certainly one half of the money come to the defendant belonged to *Kelly* in his own right, as he was not a bankrupt, and was therefore liable to the partnership debts, and the plaintiffs could not sever the respective shares of the two partners, but were entitled to attach the whole, in like manner as, on a judgment

1780.

BLACK-
QUIERE
against
HAWKINS.

[379]

(q) *B. R. T.* 7 *Geo.* 1. 1 *Str.* 187.
 * *S. P. Ladbroke v. Crickett*, *B. R.*
M. 29 *Geo.* 3. 2 *Term Rep.* 649. If
 the defence stated on the proceedings
 below, is such, as, if true, ousts the in-
 ferior court of its jurisdiction, (as where
 the party sets up a modus in answer to
 a suit for tithes,) although there has

been an interlocutory sentence in favour
 of the parson, and on an appeal that
 sentence has been confirmed and costs
 awarded, the party sued may have a
 prohibition both to the original court,
 and to the court of appeal, to stay exe-
 cution for the costs. *Darby v. Coscus*,
B. R. H. 27 *Geo.* 3. 1 *T. Rep.* 552.

1780.

BLAC-
QUIERE
against
HAWKINS.

judgment and execution against one partner, the sheriff must seize the partnership goods. For this they cited *Heydon v. Heydon* (r).

[380]

Dunning, Davenport, and Rose, for the defendant, insisted, that trust-money is not within the custom of London, as to foreign attachments, it not being in the hands of the garnishee for the benefit of the original defendant. On a question from Lord MANSFIELD, they mentioned, that the custom was certified by *Starkey*, Recorder of London, in 22d Ed. 4. as stated in *Roll's Abridgment* (s), and that this makes no part of it. In *Argyle v. Hunt*, they said, there was a concurrent jurisdiction. Here, if the money were to be paid under the attachment, the defendant would be still accountable for it to the creditors of *Wooldridge*. Neither *Wooldridge* nor *Kelly* themselves could sue the defendant for it. This is the only remedy in the defendant's power. False judgment will not lie, because the city court is a court of record; nor *audita querela*, because nothing new has happened; nor a writ of error, because there is nothing erroneous on the face of the record.

LORD MANSFIELD,—I think it impossible that this case can be within the custom; but the difficulty is, that you are too late. The objection is not to the judgment, but to the verdict. The allegation is, "You have money of *Wooldridge* and *Kelly* in your hands." The defendant answers, "I have none." The fact is found against him, and there is no bill of exceptions, nor special verdict. Inferior courts cannot grant a new trial. Nothing appears on the face of the proceedings to ground a prohibition. If the custom had never been certified, the suggestion might have stated the process merely as contrary to the common law, and then the defendant might have set forth the custom in answer to the suggestion, by which means the defence might perhaps have been got at; but, as the custom has been certified, we must take notice of it [14]. We cannot have it certified over again. The defendant should have pleaded otherwise, which would have prevented any mistake or trick at the trial. Do the plaintiffs insist on retaining the judgment below? There must be some way of getting at the defence, though there are difficulties

(r) *B. R. M. 5 W. and M. 1 Salk.*
392. *Vide Eddie v. Davidson*, T. 21
Geo. 3. *infra*, 650.

(s) 1 *Roll. Abr.* 554. K. 5.

[14] In *Argyle v. Hunt*, the court

said, they could not judicially take notice of the custom in London, for an action to lie for the word "*wobore*"—That custom, therefore, has probably never been certified by the recorder [† 95].

[† 95] With regard to foreign attachments, *Vide Fisher v. Lane*, C. B. T. 12 Geo. 3. 2 *Blackst.* 834. 3 *Wilf.*

297. & *Tamm, widow, v. Williams* & another, B. R. T. 22 Geo. 3. & T. 23 Geo. 3.

difficulties in the mode now attempted. Let the cause stand over till the plaintiffs' answer can be known.

This day, his Lordship being informed that the parties could not agree, he delivered the opinion of the court, that they must take notice of the custom, as it had been certified, and that the objection, being on a matter of fact which did not appear on the proceedings, the prohibition could not be granted.

1780.

BLAC-
QUIERE
against
HAWKINS.

The rule discharged [† 96].

[† 96] In a case of *Stainton & wife v. Jones*, which came on for trial, before Lord Mansfield, at the Sittings after M. 23 Geo. 3. at Guildhall, in an action on the custom of London, for calling Stainton's wife a whore, the plaintiffs were nonsuited, not being able to prove the custom to cart whores in London. A book from the Town-Clerk's office was produced, but it con-

tained no account of such custom. Lord Mansfield said, he could not take notice of the custom unless proved. It was stated, on that occasion, that the custom had never been proved in such a manner as to maintain an action in *Westminster Hall*: that, in the city court, the action is maintained, because they take notice of their own customs without proof.

[381]

WILTSHIRE against LLOYD.

Thursday,
27th April.

ACTION of *assumpsit*; verdict for the plaintiff, with only 17 s. damages; after which, the defendant, who was an attorney, obtained a rule to shew cause, why it should not be suggested on the roll, that he resided in *Middlesex* at the time of the action brought, and was liable to be summoned to the county court, in order to entitle himself to double costs against the plaintiff (†).

An attorney is not subject to the jurisdiction of the county court of *Middlesex*.

The case was argued on *Thursday*, the 20th of *April*, by *Peckham*, and *Mingay*, for the plaintiff, and *Cowper*, and *Runnington*, for the defendant.

The arguments against the rule were to the following effect: The privilege of an attorney is not for his personal advantage, but that of his clients, to whom it might be inconvenient, if he were liable to be taken from his attendance on their business, to answer in other courts. The act establishing the summary jurisdiction of the *Middlesex* county court could not mean to affect this privilege [15]. This is manifest from the acts relating to the Court of Conscience for *Westminster*, established in the same year (u), for, it being thought expedient that attorneys and solicitors should be liable to be sued in that court,

(†) 23 Geo. 2. c. 34. § 19.

[15] By § 4. of 23 Geo. 2. c. 33. no person is liable to be summoned to the county court, as new modelled, who was not so before, nor is the court

to hold plea of any action, cause, or suit, which it could not have held plea of formerly by plaintiff.

(u) By 23 Geo. 2. c. 27.

1780. court a particular statute, subsequent to the act establishing the court (v), was necessary to extend the jurisdiction to them [16]. But the question has already been solemnly decided, by the court of *Common Pleas*, on a demurrer, against Lloyd, in the case of *Gardner v. Jessop* (w).

[382]

On the other side, they relied on a subsequent case, in this court, viz. *Silk v. Bennet* (x), where an attorney having served the commissioners with a writ of privilege, they persisted in proceeding against him, upon which he moved for an attachment; but it was denied by the court, on the ground, that the city court had a mixed jurisdiction, *equitable* as well as *legal*, and privilege does not extend to courts of equity. So the court of *Middlesex*, it was said, has an equitable jurisdiction, being directed by the express words of the statute, to make "such order or decree as shall seem to be just and agreeable to equity and good conscience (z)." At any rate, they said, the suggestion would not be conclusive.

Lord MANSFIELD said, there seemed to be a contradiction between the two cases. He read the Master's note of that of *Silk v. Bennett*, which agreed with Sir James Burrow's report.

The court took time to consider, and, this day, their opinion was delivered, by Lord MANSFIELD, as follows:

Lord MANSFIELD,—We have spoken to the Judges of the court of *Common Pleas*, and find, that it was decided by the case in that court, that an attorney is not liable to be sued in the *Middlesex* court of conscience. Therefore the suggestion cannot be allowed.

The rule discharged (a) [† 97].

(v) 24 Geo. 2. c. 42.

[16] It is observable, however, that the preamble of 24 Geo. 2. c. 42. only says, "Whereas doubts have arisen whether attorneys and solicitors are subject to the processes of the said court."

(w) M. 30 Geo. 2. 2 Wils. 42.

(x) M. 5 Geo. 3. 3 Burr. 1583.

(y) Established by 3 Jac. 1. c. 15. Vide *Woolley v. Cloutman*, M. 20 G. 3. *supra*, p. 244.

(z) 23 Geo. 3. c. 33. § 1. There

are similar words in the *Westminster* 28, 23 G. 2 c. 27. § 1.

(a) Vide *Wase v. Wyburd*, M. 20 G. 3. *supra*, p. 246. and *Alway v. Burrows*, M. 20 G. 3. *supra*, p. 263.

[† 97] In *Huffey & another v. Jordan*, B. R. T. 25 Geo. 3. It was determined, that, where the plaintiff is an attorney, the defendant is not entitled to the benefit of 23 Geo. 2. c. 33. though resident within the jurisdiction of the county court.

1780.

BACHE and Others *against* PROCTOR.Friday, 28th
April.

ACTION on a bond, with a penalty of 2000*l*. By the condition, (reciting that *A.* had been appointed treasurer to the poor of the parish of *B.*) it was declared, that, if *A.* from time to time, and at all times, while he continued in that office, should and did render to the plaintiffs, a true, just, and perfect account, in writing, of all and every sum and sums of money that he should receive for the relief and maintenance of the poor of the said parish, the bond should be void.—The defendant having prayed oyer, and set forth the condition as above, pleaded ; 1. *Non est factum* ; 2. That *A.* did from time to time, and at all times, while he continued in the office, render to the plaintiffs, a true, just, and perfect account, in writing, of all and every sum and sums, &c. ; 3. Another plea, not differing materially from the second. The plaintiffs replied to the second plea, that the last account in writing given and rendered by *A.* (as treasurer to the said trustees,) to the plaintiffs, was on 11th of August 1778, that on that account, there appeared to be due from *A.* as such treasurer, to the plaintiffs, 276*l*. 6*s*. 5*d* $\frac{1}{2}$; that he was afterwards requested to render and pay that sum to them, according to the form and effect of the said condition, which he wholly neglected and refused to do, and that the same still remained due ; “ And so the said plaintiffs say, that the said *A.* did not, from time to time, &c. render to the plaintiffs, a true, just, and perfect account, in writing, of all and every sum and sums of money, &c. according to the condition of the said writing obligatory, in manner and form as the said defendant hath above alleged.” The replication to the third plea was nearly of the same purport, only concluding, “ And so the said plaintiffs say, that the said *A.* did not render a true, just, and perfect account of all and every sum and sums of money, &c.” without saying, “ account in writing.”—The defendant demurred to the replication to the second plea, and shewed for cause ; 1. That the rendering and paying the sum so supposed to be due, was not a matter required by the condition, nor was the refusal of payment a breach of the condition ; 2. That the plaintiffs attempted to put in issue, that the said refusal was a breach of the condition, and that therefore *A.* by such refusal, had not from time to time, &c. rendered the account in writing in the replication stated, according to the condition ; 3. That the plaintiffs did, by the replication shew, that the condition

The condition of a bond being, “ to render a fair, just, and perfect account, in writing, of all sums received,” if the obligor neglect to pay over such sums, he is guilty of a breach of the condition.

[383]

1780.

BACHE
against
PROCTOR.

was not broken, and did not avoid or deny the matter of the plea; 4. That they had attempted to put in issue matters not in controversy between the defendant and them; 5. That the said replication was argumentative and inconclusive.—Then a demurrer, and the same causes shewn, to the replication to the third plea.

Davenport, for the defendant, insisted on the strict letter of the condition, and that the non-payment and refusal was not a breach of the stipulation to render an account in writing; that these were two distinct things; the rendering an account being a preliminary step, to enable the plaintiffs to discover exactly what was due, in order that they might know what to call for, when they should require payment.

Baldwin, for the plaintiff, was stopped by Lord MANSFIELD, who said, it was clearly the intention of the parties, and the fair construction of the condition, that the money should be paid by *A.* or, in his default, by the defendant.

BULLER, *Justice*, resembled the case to one in the *Common Pleas*, where the condition of a bond was, that it should be void, if the obligor *did not pay*, and performance being pleaded on the ground of the literal expression the court held, that the palpable mistake of a word should not defeat the true intention of the parties. Here, he said, it never could be meant, that so large a penalty should be taken merely to enforce the making out a paper of items and figures.

Judgment for the plaintiffs.

Friday, 28th
April.

DEVENEGE against DALBY.

If a party is arrested in another county by a bill of *Middlesex*, the proceedings will be set aside for irregularity.

THIS was a rule obtained by *Davenport*, to shew cause, why proceedings should not be set aside, for irregularity. The irregularity was, that the defendant had been taken, at *Wimbledon*, in *Surry*, on a bill of *Middlesex*. The application was made before the time to plead was out. One ground for the rule was, that the revenue would suffer, if such a practice were to obtain.

Baldwin now shewed cause, and said, the court would not interfere, nor examine narrowly into the boundaries of counties, and that an attempt of a like sort with the present had been unsuccessful lately, in a case where a defendant was taken in *Gloucestershire* on a writ of *Worcestershire*.

BULLER, *Justice*,—In that case, the writ must have been a *latitat*, in either county. Here there should have been a difference in the form of the writ. A bill of *Middlesex*

Middlesex cannot run over all *England*. Such a practice would put an end to the writ of *latitat*; and if any notion has prevailed, that this sort of proceeding is regular, it ought to be contradicted.

1780.

DEVENEZE
against
DALEY.

The rule made absolute (*) [C]

(*) *Buller*, Justice, was absent all the remainder of the term after this day, having gone to *Bath* for his health. [C] *S. P. Borman v. Bellamy, B. R. E. 26 Geo. 3. 1 Term Rep. 187.*

AYRES against WILSON.

[385]

Tuesday,
2d May.

DEBT on a bond with 500*l.* penalty. The condition was set forth by the defendant, and it thereby appeared,—That he and several other persons, being owners or part-owners of different ships in the coal-trade, had entered into an agreement, by which they promised and agreed each with the other, and the heirs, executors, and administrators of each other, that if, at any time within three years, any of these different ships (being employed in the coal-trade) should be taken, sunk, burnt, or destroyed by an enemy, the other co-obligors should, the better to enable the owner or owners of such ship to sustain the loss, pay the sum of 500*l.* or, if the said ship should be ransomed for less, the ransom-money, to the owner or owners, (by name and without adding “and their assigns,”) of the ship so taken or lost; such co-obligors contributing thereto in equal shares, for each ship;—And the condition was, that the obligors, and each of them, and their heirs, executors, and administrators, and every of them, under the penalty of 500*l.* to be paid to *Ayres* as general trustee for all, should perform and keep the agreement.—The defendant then pleaded, that one *Douglass*, one of the co-obligors, and sole owner of one of the ships, called the *Millhall*, had sold, assigned, transferred and disposed of his ship, and all his right, title, and interest therein, after the date of the bond, to *Ward* and *White*, and that he had, from the time of such sale and assignment, ceased to have any right, property, or interest in the ship; that none of the other ships had been taken, sunk, burnt, or destroyed; that the defendant had kept and performed the agreement with the owners of the other ships; that, from the time of the date of the bond, until the sale of *Douglass's* ship, and while *Douglass* had any interest in her, she had not been taken, sunk, burnt, or destroyed, and that, during all that time, the defendant had kept and performed the agreement with *Douglass*.—The plaintiff demurred generally.

Several owners of different ships having entered into a bond to a trustee, binding themselves and their assigns to indemnify each other to a certain amount if any of their ships should be lost, and one of them having sold his ship and she being afterwards lost, the others are not liable under the bond, unless the vendor has sold (together with the ship) his interest in the agreement of indemnity.

1780.

AYRES
against
WILSON.

[386]

Cowper, for the plaintiff, stated, that this was in the nature of a mutual insurance, and contended, that the transfer of the property in *Douglafs's* ship did not make her cease to be an object of the insurance. The action, he said, was properly brought, because the plaintiff was trustee for all, and would be answerable to the person whose ship was taken or lost for the proportion of the 500*l.* he should recover from the other obligors. The parties had covenanted for themselves and their assigns; *Douglafs* or his assign would be liable if any of the other ships were lost; and the indemnity must be reciprocal. The case was the same with that of a common policy, where, if the ship and policy are assigned, the underwriters continue liable to indemnify.

Baldwin, on the other side, insisted, that the agreement appeared to have been dictated by mutual personal confidence in the skill and care of the different owners and masters who had joined in it. If a ship, insured under a common policy, is assigned without the policy, the ship is not protected in the possession of the assignee, and, here, it does not appear that there was any assignment of the agreement. *Douglafs* continues liable if the other ships are lost, because he is bound *personally*, in the same manner as an original lessor is, after the assignment of his lease; but, as the agreement is not assigned, *Douglafs* cannot sustain any damage by the loss of the ship sold, and therefore he can have no claim to an indemnity.

LORD MANSFIELD.—There is no difficulty here, as to the form of the action, because the bond is made to a trustee. But, if the agreement was transferred, we have not the whole case upon the record. If the ship was sold without an assignment of this agreement, *Douglafs* had the value independent of the agreement, and therefore it remains a mere wager with respect to him. You ought to have replied the fact, if *Douglafs* really assigned the agreement, and was damnified by the assignee calling upon him for the benefit of it [17].

Cowper had leave to withdraw the demurrer, and reply, on payment of costs.

[17] *Vide Reed v. Cole, B. R. T. 4 Geo. 3. 3 Burr. 1512.* where, in an action on the case on articles somewhat similar to the agreement here, the defendant having pleaded that the plaintiff had parted with his ship; the plaintiff replied, that he had agreed with

the purchaser to pay him 500*l.* if the ship was lost within three months, and therefore was interested. The defendant demurred; but the court gave judgment for the plaintiff, because he continued interested in consequence of his agreement with the purchaser.

1780.

The KING *against* HASWELL—and the SAME *against* BATE on the Prosecution of the Duke of RICHMOND.

Wednesday,
3d May.

ON Monday, the 24th of April, Peckham obtained a rule to shew cause, why an information should not be filed against *Haswell*, as printer of the newspaper called the *Morning Post* of the 25th of February 1780, for a libel inserted in that paper. The libel was in the form of queries addressed to the prosecutor. It imputed to him a variety of treasonable practices and designs; and accused him, among other things, of having, in his speeches in the House of Lords, opposed the increase of the military strength of the kingdom, in order, by preventing such increase, to facilitate a descent in this country by the *French*; charging him also with having conveyed intelligence to the ministers of *France*.—The rule was granted on a joint affidavit of the Duke and another person. The Duke swore that he believed himself to be the person meant in the libel, and that it contained *fasse*, scandalous and malicious aspersions, and insinuations, against him. The other deponent spoke to the fact of having bought the paper containing the libel at *Haswell's* shop.

It is an invariable rule not to grant an information for a libel, without an exculpatory affidavit, unless where the party libelled is abroad at a great distance, or the subject matter of the charge is general imputation, or an accusation of criminal language held in parliament.

On the Friday following, the 28th of April, Dunning moved for a like rule against *Bate*, as the publisher, upon the same affidavit, accompanied by another from *Haswell*, in which he swore, that the libel was brought to his shop in manuscript, without any name to it; that he sent it to *Bate*, who was the editor, or conductor of the newspaper, and that *Bate* sent it back next day, among other papers for publication.

Lord MANSFIELD now said, he was aware of an objection to which this application, as well as that against *Haswell*, was liable. The prosecutor, in his affidavit, had not specifically denied the particular charges contained in the libel, and this was, in general, expected by the court, before they would interpose by way of information. But his Lordship said, it had occurred to him, that the nature of this libel was such, that it might perhaps be an exception to the general rule. It contained, besides allegations of particular acts of a very foul and treasonable nature, general charges of treason, and also imputations of treasonable language held by the prosecutor in the debates in the House of Lords. That as to what was supposed to have been said by his Grace in parliament, it certainly was unnecessary to answer that by affidavit,

1780.
The KING
against
HASWELL
and BATE.

because what passes there can be questioned no where else [18], and general imputations did not seem to fall within the rule which requires a denial of the facts charged. His Lordship, however, added, that, if there should be a difference of opinion on this subject, the defect, which was only in point of form, might easily be cured by a supplemental affidavit.

WILLES, *Justice*, (after expressing his very high esteem for the character of the prosecutor, and his belief that no man was more incapable of the crimes charged upon him in this libel,) said, he did not well see how the court could make any distinction between him and the lowest individual.—This observation had a reference to some topics which had been urged at the bar in support of the application.—If the rule were general, he thought it ought to be adhered to in this case, and no instance had been stated where it had been dispensed with.

Dunning, upon this, mentioned, that, in the late case of *Rex v. Miles* (c), the court had said, the rule was not universal. He recollected three instances where informations had been refused, for want of an express denial of the specific charge, but they were all very distinguishable from the present case. In one of them, which happened during his early attendance on the court, the libel accused the prosecutor of being the author of a certain number of the news-paper called the *London Evening Post*. FOSTER, *Justice*, said, the imputation was a very gross libel, but there being great reason to think it was true, and there being no denial of it upon oath, the court refused the information. The second instance was in the case of General *Plaislow*, who was accused of various specific and circumstantial acts of fraud and *swindling*: and, although the charges were easily to be contradicted, he did not choose to deny them. The third was the case of *Miles*. There the prosecutor had taken upon himself to deny the specific charges, and had not done it in a complete and explicit manner. On the other hand, he remembered two cases, both of them recent, where a denial of the particular charge had not been insisted on. In the one, the libel imputed sodomitical practices to a Captain *Nichols*. In the other, the charge was against Lady *Chambers*, the wife of one of the *East-India* Judges, accusing her of adultery. In both those cases, the rule had been dispensed with; because the parties accused were abroad at so great a distance; but he also conceived that an affidavit was not required, when the court, from their knowledge of the prosecutor,

[389]

[18] *Bill of Rights*, 1 W. & M. " or questioned in any court or place
sess. 2. c. 2. § 1. *art.* 9. " out of parliament."
" dom of speech and debates in par- (c) *Supra*, M. 20 Geo. 3. p. 284.
" liament ought not to be impeached

prosecutor, or from general notoriety, were satisfied of his innocence.

ASHHURST, *Justice*, said, he had always understood the rule to be general. If it was, the rank of the prosecutor, however eminent, could make no difference. In the two instances mentioned by *Dunning*, there was an impossibility that the party accused should make an affidavit, but when that was not the case, if the court were to break through the rule on some occasions, they would throw an imputation on the character of every person from whom they should require an affidavit. The court was not to know men, and could only act on what came before them.

BULLER, *Justice*, observed, that the power of granting informations is discretionary, but he thought there ought, in all such cases, to be certain general rules to guide the court in exercising their discretion. Too much latitude was very dangerous, and the original propriety of a rule was of less importance than the strict adherence to it, if it was established. But, as part of this libel contained charges which the Duke certainly was not bound to answer, perhaps it might be proper to grant the rule as prayed, and the prosecutor might make it absolute *only as to that part*.

LORD MANSFIELD seemed to concur with BULLER, *Justice*, in that idea, and WILLES, *Justice*, thought the word "*false*," in the Duke's affidavit, a sufficient denial to ground a rule to shew cause. The rule was granted.

Immediately afterwards, *Peckham* moved to make the rule absolute against *Haswell*. LORD MANSFIELD asked, if they meant to proceed against their own witness. The motion was persisted in, and the rule made absolute.

On *Saturday*, the 29th of *April*, *Lee* acquainted the court, that the Duke had made an affidavit, expressly denying all the specific charges in the libel, except what related to his conduct in parliament. This affidavit was put in, and was an exact echo, (with negative words,) of the terms of the libel.

LORD MANSFIELD said, the court had considered the point very fully, and had had a great deal of conversation upon it, and the result was, that the rule was invariable. That it would be extremely dangerous if it were not so. The distinction hinted by *Dunning* the day before could not be admitted, for how could the court entertain suspicions against one man more than another?

Dunning read a note of a case of *Rex v. Jennison*, in *H. 13 Geo. 3.* where the libel contained an accusation of sodomy against Lord *Arundel*, and LORD MANSFIELD, and *ASTON*, *Justice*, held, that, as the charge was only general,

1780.

The KING
against
HASWELL
and BARR.

1780.

The KING
against
HASWELL
and BATE.

neral, it did not require to be answered by affidavit [C]. ASTON, Justice, also said, that it would be extraordinary if it were necessary to deny the charge, when its being true could not justify the defendant. That, if *false*, it was an abominable calumny, if *true* the defendant ought to have preferred an indictment.

Lord MANSFIELD then added, (as he had stated before,) that it had struck him, that the subject-matter might make an exception, for it would be absurd, for instance, to require of a prosecutor to swear, that he was not a traitor or a thief. He said, the court had looked into the proceedings in the case of *Lady Chambers*, and it appeared, that, there, the party applying for the information, (who was a third person,) had gone as far as the nature of the case permitted, by swearing to letters and intelligence from the *Cape of Good Hope*, where the scene of the imputed offence was laid, inconsistent with the allegations in the libel.

This day, cause was shewn by *Bearcroft*, *Howorth*, and *Anfruther*.—They produced a joint affidavit of the defendant and several other persons, tending to contradict that of *Haswell*, whose testimony was also objected to, on the ground of his being an accomplice.

In answer to this, it was insisted, by *Dunning*, and *Lee*, that, in this case, (of a misdemeanour,) he would be a competent witness at the trial; and *Lee* said, he never knew but of one instance where this had been controverted, and then the objection had been laughed at, and overruled. It was also contended, that, even if *Bate's* affidavit had contained a direct and unequivocal denial of his being the publisher, that would not be a conclusive reason for refusing the information.

Lord MANSFIELD stopped *Peckham* from going on, on the same side.

Lord MANSFIELD,—(after observing particularly on the affidavits,)—Wherever a strong probable ground is laid, the court will grant an information, if the subject-matter is fit for that mode of prosecution: and there never was a fitter subject than the present.

The rule made absolute [19].

[C] Thus in Easter Term, 30 Geo. 3. the Duke of *Athol* having applied for an information against the printer of a newspaper, for a libellous paragraph in his paper, stating that the Duke and his family were held in such general abhorrence, in the Isle of Man, that if he should succeed in obtaining an act, then depending in parliament, it would occasion a revolt; the Court held, that no affidavit from the Duke was necessary.

[19] The information was tried

the ensuing Sittings for *Middlesex*, before *Buller*, Justice, when the defendant was convicted, *Haswell* being one of the principal witnesses against him. He was brought up for judgment in 7. 21 Geo. 3. and sentenced to an imprisonment of twelve months in the *King's Bench* prison. The judgment was delayed till that term, because the prison was not till then sufficiently repaired to admit of prisoners, after the devastation committed by the rioters in June 1780.

1780.

The KING *against* the INHABITANTS of
WINCHCOMB.Friday, 5th
May.

RULE to shew cause, why an order of the court of quarter-sessions for *Gloucestershire* should not be quashed. The special case stated as follows:

The pauper hired himself in the parish of *Chipping Norton*, five weeks before *Michaelmas*, for a year, and, at the time of the hiring, it was agreed between him and his master, that his wages should be paid weekly, at eight shillings *per* week, and that, being a ballotted man in the militia, he should be absent for the month, and, in lieu of that month, should serve another at the end of the year. He was accordingly absent thirty days in the militia, and then returned to his service, but he only continued three weeks of the month which was agreed to be served in lieu of the month he was absent in the militia, leaving his master a fortnight before *Michaelmas*. He expressly swore, that he did not serve his master a year by one week.—Two justices had removed him from *Winchcomb* to *Chipping Norton*, and their order was quashed by the sessions.

On *Wednesday*, the 3d of *May*, *Bearcroft*, and *Clifford*, argued in support of the order of sessions, and contended, 1. that there was no *hiring*, nor, 2. any *service* for a year, at *Chipping Norton*.—1. The exception was part of the original contract. There was to be an interval, and then the pauper was to come and serve in the ensuing twelve-month as much more as, pieced to the former service, would make up the year; but a *hiring* under the statute must be for a whole year, without any interruption foreseen and stipulated for at the time of the agreement, as was determined in the case of *Rex v. Bishop's Hatfield* (d). Indeed the present case was more properly to be considered as a hiring by the week.—2. Here was plainly no *service* for a year. In *Rex v. Castlechurch* (e), it was laid down by Lord HARDWICKE, that the act of 8 & 9 Will. 3. c. 30. requiring a year's continuance in the same service, is to be construed strictly, being an explanatory law, and in all the cases where different services have been tacked together to make up the year, there has been no interval of time between them. This case differs from that of *Rex v. Westerleigh* (f), which was determined on the ground that the

A militia-man being hired for a year, with an express exception that he shall be absent on duty for the month, and, in lieu thereof, serve a month over the year, gains a settlement without serving the additional month.

[392]

(d) *H. 31 Geo. 2. Burr. Settl. Cases*,
No. 141.

(e) *M. 9 Geo. 2. Burr. Settl. Cases*,
No. 20.

(f) *M. 14 Geo. 3. Burr. Settl. Cases*,
No. 234.

1780.

The KING
against
WINCH-
COMB.

the hiring was conditional; there, by the agreement, it was uncertain whether the pauper would be absent or not; if he was, his place was to be filled up by another, & *qui facit per alium, facit per se*.

Dunning, and *Poole*, on the other side, contended, that, if there had been no agreement about the pauper's service in the militia, and the hiring had been, in general terms, for a year, he would have gained a settlement although he had been called out, and had been absent a month on militia duty. If a contrary doctrine were to prevail, militia-men would be in a worse situation, and less capable of gaining settlements, than the rest of the King's subjects, which the legislature certainly never intended. This was the principle of the determination in *Rex v. Westerleigh*. The reason for the exception there, and in the present case, was the same; and here, if the militia had not been called out, there would have been no interval of absence. The anxiety of the parties to guard against an event which required no provision to be made for it, could not make any difference in the law of the case.

LORD MANSFIELD,—I have no doubt that if this had been a common hiring for a year, and the pauper had served one month in the militia, and only eleven with his master, he would have gained a settlement. The master could not have refused his consent to his serving in the militia. The only question is, whether the particular agreement in this case does not make the additional month a part of the year. It is a great nicety, and we will think of it.

His Lordship, this day, delivered the opinion of the court.

[393] LORD MANSFIELD,—There is in this case a hiring for a year, and there is also a service for a year, if it were not for the month's absence in the militia. A service must be for a continuation, without interruption, or adding together broken pieces to make up the year. But here the agreement as to the absence for a month, in the militia, was only what would have been implied, and what the master must have consented to. The year was completed five weeks before *Michaelmas*, and the additional month agreed for was only in the nature of a compensation for the want of the pauper's service while absent in the militia, and equivalent to a deduction of so much wages. This case, if not the same, is very like that of *Westerleigh*. The court ought to lean in favour of settlements, and the bad consequences would be very extensive, if we were to determine, that a man should lose his settlement by serving his country in the militia. We are all of opinion, that this was a good settlement.

The order of sessions quashed, and the order of the two justices confirmed.

1780.

WEBSTER *against* BANNISTER.Friday, 5th
May.

THIS case, which came before the court at different times, and in various shapes, was finally disposed of this day. As it was often cited in other cases during the period I have undertaken to report, I have thought it might be proper to state the substance of the pleadings, and the different proceedings, although I cannot give an account of the arguments of the counsel, and the court, on the principal motion, from my own notes, having been absent when it came on.

The case was, an action of debt on a board—*Plea*, That the plaintiff ought not to have any execution *against the person, or personal estate, of the defendant, except money in the funds, or money lent upon real security only* (g), because he says that the debt in the declaration mentioned was contracted or due before the 22d of *January* 1776, mentioned in a certain act of parliament, entitled, “An act for the relief of insolvent debtors, &c.” (16 Geo. 3. c. 38.) and that he was, before the 1st of *January* 1776, arrested, and in actual custody, that he surrendered himself in discharge of his bail, and was thereupon committed a prisoner to the prison of the *King’s Bench*, before the 26th of *June* 1776, and was afterwards discharged according to the form of the said act, at the quarter sessions for *Surry*, on the 29th of *July* 1776, and this he is ready to verify, wherefore he prays judgment if the plaintiff ought to have any execution against his person or personal estate, except money in the funds, or money lent upon real security only.—The *Replika-*

tion stated and made *profert* of the condition of the bond—which was, for the payment of an annuity of 30*l.* a year by the defendant, and another obligor, to the plaintiff, in quarterly payments, on the 11th of *January*, of *April*, of *July*, and of *October*; the first payment to be made on the 11th of *January* 1772.—The replication then set forth, That after the 22d of *January* in the plea mentioned, and before the exhibiting the bill of the plaintiff, to wit, on the 11th of *July* 1776, 7*l.* 10*s.* for one quarter, and so other quarterly payments, on the 11th of *October* 1776, the 11th of *January* 1777, and the 11th of *April* 1777, became due, and that the defendant had not paid them, or any part thereof, on those respective days or at any other time, but the whole remained due, “by reason of which premises, the said writing obligatory in the declaration mentioned became forfeited, and the debt and action accrued after the 22d of *January* 1776, in the

By an express agreement the obligee of a bond to secure an annuity, may waive the forfeiture for non-payment on the day, so as to be entitled to recover against the obligor, although he has been discharged under an insolvent debtor’s act between the time of the forfeiture and the action brought.

[394]

(g) 16 Geo. 3. c. 38. § 41. Stated *supra*, p. 99.

1780.

WEBSTER
against
BANNISTER.

[395]

"plea mentioned," and so concluded with a verification.—After this replication, there was an entry of judgment on the record, for want of a plea in bar to the action, but with stay of execution against the person and personal estate, except, &c. until the plea depending between the parties in that behalf should be determined.—*Rejoinder*, That, before the said 22d of January 1776, to wit, on the 11th of January 1776, 7l. 10s. for one quarter of the annuity because due, and was not paid then, nor at any time since, but still remained due, whereby the bond was forfeited, and the said debt, by virtue thereof, accrued to the plaintiff before the said 22d of January 1776.—*Sur-rejoinder*, That true it was that 7l. 10s. for one quarter became due on the 11th of January 1776, but that the plaintiff afterwards, at the instance and request of the defendant, agreed to give him day of payment of the said 7l. 10s. until a future day, to wit, till April following, and that, on the 18th of April, the said 7l. 10s. was duly paid, and that, at the time when the plaintiff so gave day of payment, he did, at the instance of the defendant, waive and relinquish any forfeiture of the bond which had accrued or might accrue to him by reason of the non-payment according to the condition, and acquitted and discharged the defendant from such forfeiture, and all and every debt and debts due thereby; and the plaintiff further says, that the defendant, by reason of the premises, was acquitted and discharged from such forfeiture and debts.—*Rebutter*, By which, (protesting that the sur-rejoinder was not sufficient in law, and protesting also that the defendant never requested the plaintiff to give such day of payment,) the defendant says, that the 7l. 10s. in the sur-rejoinder mentioned, was not paid to the plaintiff in manner and form, &c.—Upon this issue was joined.

The cause was tried before Lord MANSFIELD, at the Sittings for Middlesex, in Easter Term, 18 Geo. 3. and a verdict being found for the plaintiff, a rule was obtained by the defendant, for the plaintiff to shew cause, why the judgment should not be arrested; which rule was afterwards enlarged to M. 19 Geo. 3. when the Solicitor General, and Bower, shewed cause;—*Dunning*, and *Baldwin*, for the defendant.

The ground of the motion, (as I have been well informed,) was, that, the bond being once forfeited, the debt became absolute, and could not be again made contingent, by any waiver of the forfeiture, on the condition of payment at a future day; at least it continued absolute till the compliance with the condition, which was not till after the insolvency; therefore the fact of the compliance with the condition after the insolvency was immaterial, and the plaintiff should have demurred to the rebutter instead of

of joining issue on an immaterial fact. That the court therefore ought to award a *Repleader*.

On the other side it was insisted, that an obligee might waive the forfeiture, and thereby prevent the debt from becoming absolute even at law, especially since the statute of 4 & 5 Anne, c. 18. The issue, therefore, was not immaterial, because the debt was to be considered as contingent or not at the time of the insolvency, according as the condition was or was not afterwards complied with. Or, if the issue was immaterial, that was no reason why the plaintiff might not have judgment, provided enough appeared to entitle him to it on any part of the record; for, in such case, all that followed would be rejected (a), and here the conditional waiver appeared in the sur-rejoinder, and was not denied, and the debt was to be looked upon as contingent till a breach of the condition, and therefore was so at the time of the insolvency.

BULLER, *Justice*, asked if it was not a rule, never to grant a repleader when the issue is found against the party tendering it. He said he thought it was, and that he could find no case of any exception to it.

The rule was discharged.

The defendant, when he was arrested in this action, had applied to ASTON, *Justice*, and afterwards to the court, to be discharged on filing common bail, and obtained a rule to shew cause, but which was, afterwards, discharged.

In *Michaelmas Term*, 19 Geo. 3. a writ of error was brought, but bail in error not being justified, a *capias ad satisfaciendum* issued in the ensuing term, the effect of which was prevented by a commission of bankruptcy against the defendant. The validity of the commission being afterwards disputed by the plaintiff and another creditor who opposed the allowance of the certificate, the Chancellor directed an issue, which was not proceeded upon, and the plaintiff having brought a *scire facias* against the original bail, the defendant surrendered himself, and, on a former day in this term, obtained a rule to shew cause why he should not be discharged out of custody.

This day, the *Solicitor General*, and *Bower*, shewed cause.—*Dunning*, and *Howorth*, for the defendant.

The ground of the application now was, that, although the defendant, by imprudently taking issue on an improper fact, had failed in his defence to the execution against his person, upon the pleadings, yet he was clearly entitled to be discharged under the insolvent act. They produced an affidavit denying that there ever had been an agreement to waive the forfeiture, and said, that no such agreement had been proved at the trial, and, if issue had been taken on that

1780.

WEBSTER
against
BANNISTER.

[396]

(a) For this they cited 8 Co. 120. 133. 9 Co. 110. Hob. 56. Salk. 173.

1780.

WEBSTER
against
BANNISTER.

[397]

that fact, it must have been found for the defendant. The penalty therefore was a debt due at the time of the discharge under the act, and consequently he was no longer answerable for it, with his person.

On the other hand, it was insisted, that, if there was any mistake in the pleadings, it was the defendant's own fault, and he had never moved for leave to amend. Besides, they said, (which was not contradicted on the other side,) that it appeared at the trial, that a note had been given to the plaintiff for the payment both of the quarter due on the 11th of *January 1776*, and of that which was to become due on the next quarter day, and that the plaintiff, by taking this note, must be considered as having agreed to give further day of payment.

Lord MANSFIELD said, he thought the note would have been evidence of such an agreement, if issue had been joined on that fact, and that there was no doubt but the party might waive the forfeiture, and accept what he was equitably intitled to.

BULLER, *Justice*, absent.

The rule discharged [21].

[21] The case of *Perkins v. Kemp* *trell v. Hooke*, H. 19 Geo. 3. *supra*, land was not cited, I believe, in any of p. 97. and *Wyllie v. Wilkes*, M. 21 Geo. 3. the arguments on this case. *Vide Cott. infra*, p. 519.

Friday, 9th
May.

The KING against GODWIN.

The court will not decide the validity of the election of a corporate officer, if the question is new or doubtful, on a rule to shew cause for an information in the nature of *quo warranto*.—

Qu. Whether, if a mayor *de facto* intervenes, the mayor of the former year, who is returning officer and is entitled to hold over by the

THIS was a rule to shew cause, why an information in the nature of *quo warranto* should not be filed against the defendant, for taking upon himself the office of mayor of the borough of *Portsmouth*.

The material circumstances of the case were these: By a charter of 3 Car. 1. the right of electing a mayor in this borough is vested in the majority of the aldermen and burgesses. The aldermen are twelve in number, and the mayor must be chosen from among them. He is elected for a year, from *Michaelmas* to *Michaelmas*, and "until one other of the aldermen shall be in due manner and form elected and sworn mayor of the said borough." The method of electing the mayor is this: A list is prepared of all the aldermen, except the mayor then in office. Each elector makes a mark or scratch against two names in this list, and the two aldermen who have the majority of such scratches are put in nomination. Then the electors ballot for those two, and he who has the majority on the ballot

charter till a legal successor is chosen, can be chosen the third year, under 9 Ann. c. 20. § 8.

ballot is declared duly elected. The mayor is the returning officer on the election of members to serve in parliament.

By the statute of 9 *Ann. c. 20. § 8.* it is enacted, that no person who hath been, or shall be, in any annual office to which it belongs to preside at the election, and to make return, of any member to serve in parliament, shall be capable of being chosen into the same office for the year ensuing; and where any such officer is to continue for a year, and until some other person shall be chosen and sworn in, if such officer shall voluntarily and unlawfully obstruct and prevent the choosing another, he is to forfeit 100 *l.*

In September 1777, *Linzee*, "an alderman," was chosen mayor, and served the office till Michaelmas 1778, when *Blissel*, "then acting as an alderman" (*b*), was elected to succeed him, and sworn into the office. In the mean time, an information in the nature of *quo warranto* having been filed against *Blissel* for executing the office of an alderman, issue was joined in that cause, and, on the trial, a verdict found for the crown. *Blissel* then applied for a new trial, but was refused [22], and judgment of ouster was entered against him; which judgment, on a writ of error in the House of Lords, was affirmed. He continued however still to act as mayor, and, in September 1779, presided

1780.

The King
against
Godwin.

[398]

(*b*) These were the words of the affidavits of *Linzee* and others, on which the present motion was made. *Infra*, p. 399. Note (*k*).

[22] That motion came on in *E. 19 G. 3. (Thursday, 6th May)*. The cause had been tried at the preceding spring Assizes for *Hampshire*, before *Habam*, Baron. There were six issues, but the material one was, whether *Blissel* had been duly elected an alderman; and this, with three others, was found against him. One of the points on the motion for a new trial was this: In 1778, *Blissel* and one *Pike* were put in nomination at the election of aldermen. The assembly consisted of the mayor, (*Linzee*,) and three aldermen; *Pike* was chamberlain of the corporation, and the mayor objected to him as ineligible on that account, because the auditors of the chamberlain's accounts are aldermen, and he could not hold an office in the exercise of which he would be liable to audit his own accounts.

The three aldermen however voted for *Pike*; the mayor alone for *Blissel*; but he told the aldermen that their votes were thrown away, and declared *Blissel* duly elected, and swore him in. The answers given to the objections, just stated, to *Pike's* eligibility were, 1. That, although the usage since the charter of *Car. 1.* had been to appoint the auditors from among the aldermen, there was no provision in the charter rendering that necessary, and, before the charter, they had been sometimes chosen from the burgesses at large. 2. That if the two offices were incompatible, then the acceptance of the higher of the two, (that of alderman,) *ipso facto* vacated the other. For this several authorities were cited, (*Com. Dig. Tit. Office, B. 6.*) and the court were of opinion that the law was so [C]. *Beartcroft*, *Grose*, Serjeant, and *Dunning*, shewed cause.—*Davis*, Serjeant, for the defendant.

[C] But it is now settled that this is not the criterion, but that, when two offices are incompatible, the sub-

sequent acceptance of one vacates the other. *Milward v. Thatcher*, *M. 28 Geo. 3. 2 Term Rep. 81.*

1780.

The KING
against
GODWIN.

[399]

sided as such, at the election of a successor, when *Linzee* was re-chosen; but, on the charter-day for swearing in the new mayor, *Linzee* did not attend, being advised, (as he swore in his affidavit,) that he was not duly elected. In consequence of this, *Bliffel* still continued to act, till the 21st of October 1779, when the aldermen, having given him previous notice, met and removed him, by virtue of a power vested in them by the charter, and elected *Carter*, another alderman, in his place. *Carter* acted for some time, till being advised that his election also was illegal, he obtained a *mandamus* to the aldermen and burgesses to proceed to the election of a new mayor. In obedience to this *mandamus*, an election was held on the 10th of February 1779, at which *Carter* presided as senior alderman. On that occasion, when the town-clerk and chamberlain, (whose business it was,) came to make out the list, *Carter* directed them not to insert *Linzee's* name in it, treating him still as mayor under the charter, there having been no legal election since he was chosen in 1777. However, *Rickman*, a burgess, (and the attorney in the present prosecution,) was permitted to insert *Linzee's* name. The greatest number of scratches were for him; the next for Lord *Hawke*, (also an alderman,) and the fewest for the defendant; but *Carter* insisted, that, notice having been given of *Linzee's* being ineligible, the votes for him were thrown away, and that only Lord *Hawke*, (who had sent a letter stating that he was ineligible, being confined by ill health, and not having taken the sacrament within a twelve-month (i),) and *Godwin* should be balloted for. *Rickman* insisted, on the part of *Linzee*, that, as he had never acted since Michaelmas 1778, and there had been intervening mayors, *de facto*, since his former mayoralty, he did not fall within the meaning of the act of Queen *Anne*. Accordingly, his friends proceeded to ballot for him, and, on reckoning the number of balls, there appeared to be twenty-one for *Linzee*, and only twelve for *Godwin*: but *Carter* still professing to consider *Godwin* as duly elected, he was sworn in, and took upon himself the duties of the office.

Beacroft, *Grose*, Serjeant, and *Lee*, shewed cause.— They admitted, that the only question was, whether *Linzee* was ineligible, and the votes given for him thrown away; for that, if the law was not so, *Godwin's* election was void. But they contended, that, under the circumstances of the case, *Linzee's* ineligibility was clear, and that the electors were so fully apprized of it, that the court ought to decide the question in this stage of the proceeding, without the circuitry and expence of a trial on an information in the nature of *quo warranto*. *Linzee's* conduct, they said, was manifestly, and throughout, a meer trick and contrivance,

to

(i) 13 Car. 2. stat. 2. c. 1. § 12. 5 Geo. 1. c. 6 § 3.

to evade the statute of *Queen Anne*, and entitle him to act as mayor at any time, when he should have a turn to serve as returning officer for the borough. He had not ventured to swear, that *Blissel* was, or that he believed him to be, an alderman, when he was chosen mayor, but only that he acted as such (*h*); plainly admitting thereby, that he knew he was not duly entitled to that office, and he had voted him as mayor, knowing his defect of title as alderman, merely that one of his own party might, *de facto*, take upon himself the office, to give him a pretext of being eligible for the ensuing year. *Blissel*, not being eligible, was no mayor, and therefore, by the express words of the charter, *Linzee* continued to hold over, and consequently was ineligible at the last election. His not having acted during *Blissel*'s year could not make any difference, because the statute of *Queen Anne* applied to mayors *de jure*.—They cited the case of *Rex v. The Corporation of Cambridge* (*l*), in which the court had decided the validity of an election of mayor, on a rule to shew cause, upon the ground that the facts were clear and indisputable.

The *Solicitor General*, on the other side, contended, that this case was not within the meaning of the statute of *Queen Anne*, the only object of which was, to prevent the office of returning officer continuing permanently in the same hands. Here, there was no doubt, but *Blissel* would have been returning officer, if an election of a member of parliament had happened while he continued, *de facto*, to exercise the other functions of mayor. He had never been ousted from that office, upon an information in this court, as not having been duly elected, but, on the contrary, was treated as mayor, in the proceedings by which the corporation had removed him. At any rate, this was too important a question to be decided in this summary way. The whole ought to be put upon record, that it might be in the power of the parties to have the point solemnly argued and adjudged, and if they chose, re-considered, in another place, on a writ of error.

Lord MANSFIELD,—The only question now before the court is, whether the case is so clear, as that we ought to refuse an information to try the title, when it is admitted, that the person sworn in had not the majority of votes. It is contended that *Linzee* was clearly ineligible under the act of *Queen Anne*, because, by the charter, he had a right to hold over, although, in fact, he did not act as mayor, and *Blissel* did. The object of the act undoubtedly is, that the same person shall not be returning officer during two successive years. But there has been no case on the construction of this act, and the court cannot, in a summary way, decide, whether the intervention of a mayor, *de facto*, makes

1780.

The KING
against
GODWIN.

[400]

(*l*) *Supra*, p. 398. Note (*h*).
VOL. I.

(*l*) *H. 7 Geo. 3. 4 Burr. 2008.*
C c

1780.

The KING
against
GODWIN.

makes a difference [C]. It is said, *Blissel's* election was fraudulent. But both sides have not been heard, and fraud must be manifest and gross before the court will decide in the first instance. In the *Cambridge* case, the fraud was palpable. They had elected a gentleman who was just gone to *America*, and there was no ground stated of any belief, that he would return within the year. If he had chosen to return on purpose, near half a year must have elapsed, before he could have had notice, so as to come back to *England*. However, in that case, the application was for a *mandamus* to proceed to choose a mayor, and making the rule absolute was not final, for the corporation might have returned to the *mandamus*, that there was a mayor, if they had thought the former election could be supported.

The rule made absolute.

[C] *Rex v. London*, M. 27 Geo. 3. Term Rep. 423, 425, 426.

Saturday, 6th
May.

The KING against TOMS.

The parochial assessments for the vicar of *St. Michael's* in *Coventry* established by 19 Geo. 3. c. 60. are not rateable to the poor.

THIS was a rule to shew cause, why an order of sessions, confirming a poor's rate, should not be quashed. In the year 1558, which was the 4th of *Philip* and the 5th of *Mary*, a private act of parliament passed, entitled, "An act for the payment of *tithes* in the citie of "*Coventrye*," by which, after reciting,—That formerly the *tithes*, profits, and casualties, of the two vicarages, or parishes, in that city, (*St. Michael's* and the *Trinity*,) were sufficient for the maintenance of the vicars, but had, of late, so much decayed, as to be insufficient to answer that purpose, and that there was no ordinary way, by the law or statutes of the realm, to enforce the inhabitants to pay any other kind of *tithes* and duties to the vicars, than they themselves should think meet (a),—it was enacted, that the citizens and inhabitants of the said city and suburbs should pay their *tithes* to every of the said vicars, after the rate of twelve-pence by the year for every ten shillings rent, by quarterly payments, and every householder paying ten shillings rent, or above, was discharged of the four offering days, but his wife, children, or servants, taking their rites of the church at *Easter*, were to pay two-pence for their four offering days, yearly. If any variance should arise for non-payment of any tithes, or upon the true knowledge or division of any rent or tithes, so that any house or other things mentioned in the act should escape without rating, or if any doubt should arise on any other thing contained in the act, then, on complaint made by the

(a) *Infra*, p. 403. Note [1].

IN THE TWENTIETH YEAR OF GEORGE III.

the party grieved, to the mayor, he was, by the advice of the council, to call the parties before him, and make a final end, awarding costs at his discretion, and that of his assistants, and, if he did not make an end within a month after complaint made, or if any of the parties found themselves aggrieved, then the Lord Chancellor of *England*, upon complaint to him made, calling to him the two Chief Justices, was to make such final order, and award such costs as to him or them should seem meet.

1780.

The KING
against
TOMS.

This act, manifestly very difficult in the execution, did not appear to have ever been enforced, till *Rann*, the vicar of the *Trinity*, attempted it, a few years ago, against *Green*, one of the inhabitants of that parish, by an application to the Chancellor; in consequence of which, his Lordship, calling in the two Chief Justices, made an order on *Green* for the payment of the rate of two shillings in the pound. *Green* refused to comply with this order, and the act had not provided any particular method of carrying it into execution. *Rann*, therefore, brought an action of *assumpsit* upon it, which was tried before Lord MANSFIELD. In his declaration in that action, the plaintiff described the statute as being of the 4th of *Philip & Mary*, whereas the record, when produced in evidence, appeared to be of the 4th and 5th of *Philip & Mary*. It was contended by the defendant's counsel, that this was a fatal variance, for that there was no such year as the 4th of *Philip & Mary*, since the Queen had reigned a year longer than her husband; this case differing from the common instances of statutes described as of two different years of the same reign. In those instances, as every act has relation to the first day of the session, (unless some other day is fixed in the act itself,) it was, they said, indifferent whether both years were mentioned, or only the first, in the description of the act, but, in the present case, the words "4th and 5th of *Philip & Mary*," made a material part of the description. A verdict was found for the plaintiff, but the same objection being urged on a motion for a nonsuit, (which was made in *Michaelmas Term*, 17 Geo. 3.) the court were of opinion, that the variance was fatal, and the rule for a nonsuit was made absolute (1) [† 98].

Had it not been for this mistake in pleading, the plaintiff would probably have succeeded, for the court seemed to be clear, that the action of *assumpsit* would lie upon such an order (m). But still there were great difficulties in the way.

(1) *Hill*, Serjeant, argued for the plaintiff, and *Wallace* for the defendant.

[† 98] That case of *Rann v. Green* has been since reported, *Cowp.* 474.

(m) *Vide Bell v. Burrows*, C. B. E. 5 Geo. 3. *Law of Ni. Prius*, Ed. 1755.

p. 129. *Vide*, also, *supra*, p. 10. Note [2] [† 99].

[† 99] *Vide*, also, *Brown v. Bullen*, *infra*, 407.

1780.

The KING
against
Toms.

way. A new order, and a separate action upon that order, would have been necessary against every individual, who should dispute the payment, and there was great opposition raised in both parishes against the attempt of compelling a regular compliance with the act. At last, both the vicars applied to parliament, and two acts were passed, the first for the parish of the *Trinity*, (19 Geo. 3. c. 57.) the other for that of *St. Michael's*, (19 Geo. 3. c. 60.), by which a new mode of rating, and a more easy method of enforcing payment, were established.

The statute relative to the parish of *St. Michael's* was intituled, "An act for establishing certain payments to be made to the vicar of the parish of *St. Michael's*, in the city of *Coventry*, in lieu of tithes, and for repealing so much of an act of the 4th and 5th of *Philip & Mary* as relates to the payment of tithes in the said parish." The preamble recites, that certain rates and payments had been made to the vicars of the parish, which composed the principal, and almost whole, of their emoluments [1]; that, by an act passed in the 4th and 5th of *Philip & Mary*, two shillings in the pound had been charged on the occupiers of all houses, buildings, and gardens, within the city and suburbs, and made payable to the vicars of the respective parishes therein; but no payment or claim had ever been made under the said act, within the parish of *St. Michael's*; that, if enforced, it would now become an intolerable burthen, and a subject of endless expence and litigation, and that the vicar and inhabitants had come to an agreement to raise, by a rate, certain sums of money, to be paid to the vicars for the time being, in lieu of the said ancient rates and payments, and of all rights and claims under the said act (m). The new statute then enacts, that all the ancient rates shall cease, and the statute of *Philip & Mary* be repealed, and substitutes a new rate or assessment, declaring, "That such rate or assessment shall be in lieu and full discharge of all ancient payments, *Easter offerings*, tithes, and other ecclesiastical dues, claims, and demands whatsoever, heretofore paid or payable to the vicar, (except surplice fees, and such stipends, donations, and bequests, as have been heretofore, or shall be hereafter, bestowed upon the vicar for the time being) (n);" The rate to be made by assessors, one half appointed by the vicar, and the other by the inhabitants, and the payment to be enforced by distress and sale (o). By § 28. an option is given to the parish officers, to raise yearly, by a pound rate made by them in the proportions prescribed

[404]

[1] So that probably from the time of *Ph. & M.* till this new act the vicars were paid by arbitrary and voluntary contributions, in the same manner as

before the old statute. *Supra*, p. 401. Note (a).

(m) § 1. (n) § 2.
(o) § 18.

prescribed by the act, any sum not exceeding 300*l.* nor less than 280*l.* and to pay the same to the vicar by equal quarterly payments, "clear of all taxes, deductions, charges, and expences, whatsoever, *parochial*, parliamentary, or otherwise howsoever, which said sum is to be in full satisfaction of all the vicar's claims under this act," and, in such case, during such payment by the parish officers, the power of appointing assessors is to cease.

The order of sessions now brought before the court set forth, "That it appeared, that, in a rate for the necessary relief of the poor of the parish of *St. Michael*, in the city of *Coventry*, for one month, bearing date the 1st day of *December* 1779, the appellant was rated in the words and figures following :

"The reverend *Benjamin Toms*, vicar of the said parish, for his parliamentary payments, in lieu of *tithes*—yearly rent 200*l.*—10*l.*"

Then, after stating that in the said parish there are generally four or five rates for the relief of the poor in each year, the case recited the provisions of the act of 19 *Geo.* 3. c. 60. and set forth, "That in pursuance of the said act, and within the time therein limited, an assessment, bearing date the 13th of *August* 1779, was regularly made, entitled "An assessment by an act of parliament, (stating the title of the act,) for the said vicar for one year, amounting in the whole to the sum of 274*l.* 14*s.* the greater part of which hath been collected, and the remainder is now collecting by the said vicar." That the said *Benjamin Toms* was rated as above to the poor of the said parish, in respect of the said revenue accruing to him from the said act of parliament and assessment made in pursuance thereof. That the annual income received by the said *Benjamin Toms* as vicar, before the passing of the act of 19 *Geo.* 3. amounted in the whole to about 90*l.* a year, including the *Easter* offerings, which amounted to about 40*l.* thereof; but that neither he, nor any of his predecessors, had been assessed to the poor in respect thereof."

Dunning, *Wheeler*, and *D'Ewes*, argued in support of the order of sessions.—They contended, that this was a species of property clearly rateable under the statute of the 43d of *Elizabeth*. *Tithes* are expressly mentioned in that statute, and although there is no direct decision that a *modus* is rateable, the principle has often been recognized, as in the case of *Rex v. Lambeth* (q). This is in truth a *modus* established by act of parliament, both the statute of *Philip & Mary*, and that of the present King, declaring, in their very titles, that the payments were to be *in lieu of tithes*. The exemption in the 28th section of the present act, from whence it was argued at the sessions that the assessments,

1780.

The King
against
Toms.

[405]

1780.

The KING
against
Toms.

assessments, however made, were not liable to the poor's rate, afford the strongest proof to the contrary; for it is very strange reasoning to say, that where an express exemption is given in a particular case, such exemption is also meant to take place in another case, where nothing is said about it. If the vicar was never rated before the new act, *that* only arose from indulgence, on account of the smallness of his income, and is neither a proof that he was not then liable to be rated, nor a reason why he should not contribute to the parish burthens now that his salary has been encreased from 90*l.* to near 300*l.* a year.

The *Salicitor General*, *Lee*, *Digby*, and *Gough*, on the other side.—These payments, though called *tithes*, are, in their nature, quite different, and resemble rents arising from land, which have been determined not to be rateable. Part of the payment is given *in lieu of Easter offerings*, and they are clearly not rateable.—(*Dunning* said he conceived they were).—If this attempt succeed, a fraud has been committed both on the defendant, and on *Rann*, for it was certainly not in the contemplation of the parties, when the two acts passed, that there should be any deduction from the new salary.—(*Lee* said he spoke this of his own knowledge, having been counsel for *Rann* in support of his act, when it was depending in parliament.)—If any such deduction had been intended, why was it not expressly mentioned in the bill, which would have given the vicar an opportunity to object, or oppose it? By § 30. of 19 *Geo.* 3. c. 60. half the expence of the act is to be paid by the vicar out of the first money collected under it, and, as the subject of this rate is the first assessment under the act, and he is rated to the full amount, he will pay for what, in truth, he will not receive. As to the express words of exemption in § 28. there is little stress to be laid upon any argument from thence, on one side or the other. They may have been inserted from some idea that the salary would otherwise be rateable if paid in a gross sum by the parish.

[406]

Lord MANSFIELD,—This is in the nature of a private act of parliament, where the legislature only lends its aid to the agreement of the parties, in order to render it effectual, when any public reason stands in the way. The payments established by the act of *Philip & Mary* were not rateable under the statute of 43 *Elizabeth*. They were in the nature of rents for houses, which are not rateable. Those payments, if enforced, would have been double what has been substituted in their place, but, on the other hand, the remedy by application to the summary jurisdiction given to the Chancellor and the two Chief Justices was very inconvenient to the vicar.—(His Lordship here stated the different proceedings in the case of *Rann v. Green*)—

Upon

Upon this the parishioners and vicar of *St. Michael's* came to an agreement. For what? Not that the new payments should be made liable to a duty to which those which they were substituted for were not liable. The agreement was, that the vicar should receive to a *less* amount, but *more easily*. If the sum shall amount to 280*l.* the vicar is to receive that sum clear of all *parochial* and other deductions, provided the parish choose to take the collection of the rate upon themselves. This they certainly will do, whenever it is likely to exceed the 280*l.* The vicar will only have the collection to make, when it falls under the sum. Is it possible that it could be intended that when he received *less* than 280*l.* it should *not* be free from all deduction? I am clear that the true meaning of the act is, that this property shall not be rateable to the poor.

WILLES, and ASHHURST, *Justices*, of the same opinion.
BULLER, *Justice*, absent.

The order of sessions, and the rate, quashed [1].

[1] In *T. 22 Geo. 3.* the rateability of the new payments in the parish of the *Trinity* came in question upon a special verdict, in the case of *Rann v. Pickin and others*, when the court declared, that the ground of the decision in *Rex v. Toms*, was the agreement and optional clause; and, as the act relative to *Rann's* parish did not pass by

agreement with the parishioners, and contains no clause like 19 *Geo. 3. c. 60.* § 28. they held that the payments *there* are rateable.—The case was argued by *Balguy*, for the plaintiff, and *Dayrell*, for the defendants. *☞ Vide Lowndes v. Horne, C. B. H. 19 Geo. 3. 2 Blackst. 1252.*

1780.

The KING
against
Toms.

PAYNE *against* ROGERS.

[407]

Monday, 8th
May.

THE plaintiff was tenant of a commonable tenement, and his landlord had brought an action on the case, in his name, for an encroachment on the common by inclosure, and had offered to indemnify him against all costs and charges in the action. Pending the suit, the defendant procured a release from the plaintiff, upon which the landlord obtained a rule to shew cause, why this release should not be delivered up to be cancelled, and he be permitted to proceed in the cause, in the name of his tenant. The rule was opposed, on the ground that the court could not interfere, as the landlord was not a party on the record; that he had not been under any necessity of using his tenant's name, but might have sued in his own, for an injury done to the inheritance; and that the defendant could not, with prudence, go on in this action, because the tenant was not able to pay costs, if there should be a verdict against him.

If a person who is sued by a landlord in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed.

1780.

PAYNE
against
ROGERS.

The court expressed great indignation at this attempt of the defendant, to prevent a landlord from trying a right in the name of his tenant. ASHHURST, *Justice*, seemed to doubt, whether the landlord could have sued in his own name, under the circumstances of the case, as stated by the *affidavits*; and Lord MANSFIELD said, that, as to the danger of the defendant's losing his costs, *that* would be the proper subject of an application for the interference of the court.

Heworth, in support of the rule.—*Baldwin*, for the defendant.

BULLER, *Justice*, absent.

The rule made absolute.

Monday, 8th
May.

BROWN and Another, Executors of GRAVATT,
against BULLEN, Assignee of Fox, a Bank-
rupt.

Assumpsit will be for a creditor's share under an order of commissioners of bankrupt for a dividend.—In such action, the proceedings before the commissioners are conclusive evidence of the debt.—And the assignees cannot set off a debt due from the plaintiff.

* [408]

ACTION for money had and received, tried before Lord MANSFIELD, at the Sittings for *Middlesex*, after last *Michaelmas Term*; verdict for the plaintiff, but with leave to move to set aside the verdict, and enter a nonsuit. *Davenport* accordingly, obtained a rule to shew cause, on *Thursday*, the * 27th of *January*, which came on to be argued on *Wednesday*, the 9th of *February*.

The *Solicitor General* for the plaintiffs.—*Dunning* and *Davenport*, for the defendants.

The case, upon his Lordship's report, appeared to be as follows:—The testator, *Gravatt*, proved a debt of 410*l.* 1*s.* 7*d.* under the commission against *Fox*. Afterwards, a dividend of six shillings in the pound being declared by the commissioners, and *Gravatt* having died in the interval, the plaintiffs, as his executors, demanded their share of the dividend, amounting to 123*l.* 1*d.* which the defendant refused to pay, alleging, that there was a balance due by *Gravatt* to the bankrupt. Upon this, the plaintiffs brought this action. The defendant pleaded *non assumpsit*, and delivered a notice of set-off.

At the trial, it was contended, on the part of the defendant; 1. That the action could not be maintained, the only method of recovering debts, proved under a commission of bankruptcy, being by application to the Great Seal; 2. That, if the action was maintainable, the consideration and circumstances of the debt must be gone into and proved, as in other actions of *assumpsit*; 3. That, if this was not incumbent on the plaintiffs, yet it was competent to the defendant, to avail himself of the notice of set-off.

Lord

1780.

BROWN
against
BULLEN.

Lord MANSFIELD over-ruled all those points. He thought, 1. That the action was maintainable; 2. That the only way to question the proof of the debt taken by the commissioners, was by petition to the Chancellor; that by the statutes, the oath of the party is to be the proof of the debt, and a particular penalty is imposed for swearing to a false debt (r); and, 3. That as the commissioners have a power of setting off mutual debts (s), the sum proved must be taken to be the balance due; but if it should happen, that only one side of the account appeared before the commissioners, or that any article was omitted on either side, on application to the Great Seal, the account would be again opened, and referred to the commissioners, or, in case of difficulty, to the master.

These topics were now enlarged upon, on the part of the plaintiffs.

For the defendant, it was admitted, that relief might have been obtained by application to the Great Seal; but it was said, that it did not therefore follow, that the defendant might not avail himself of the truth and justice of the case, on the trial of an action at law. Indeed the action itself was novel, and would, if encouraged, tend to disturb the execution of the bankrupt laws, which never meant to subject assignees to actions from creditors. The proper course, and daily practice, is, for them to seek their relief by application to the Chancellor. But if the action is maintainable, as the plaintiffs have chosen to come into a court of law, they must be subject to the same conditions with others suing in the same sort of action; they must give the regular evidence of their debt, there being no instance where a man, can, in a court of law, substantiate a demand by his own oath. The intention of the bankrupt laws was only, that the oath of the creditor should be conclusive to the effect of entitling him to vote for assignees. For every other purpose it may be questioned. The plaintiffs must also submit to have the demands of the assignees set off against them, there being no exception of which they can avail themselves in the statutes of set-off. If the defendant were to go before the Chancellor, *he* would perhaps direct an issue, and then the parties would, after that circuitry, find themselves in the same situation as they now are in. If the defendant, not being allowed to set off the debt due by the plaintiffs, should be driven to sue them in another action, they may, in the mean time, have paid away what they shall receive under the dividend, and by pleading *plene administravit* deprive him entirely of all remedy.

Lord MANSFIELD said, this was a general question, and ought to be looked into. That at present of the two opinions,

(r) 5 Geo. 2. c. 30. § 29.
VOL. I.

(s) 5 Geo. 2. c. 30. § 82.
D d

1780.

BROWN
against
BULLEN.

opinions, he was rather inclined to hold that the action would not lie, than that proof could be admitted to question the debt, or the amount; for, if that could be done, and the sum found by the verdict should differ from that proved before the commissioners, the action would not make an end of the matter, but the parties must go back to Chancery, to have the dividend altered, which would be circuitous and inconvenient.

The court took till this term to consider of the case, and, now, Lord MANSFIELD delivered their opinion as follows:

[410]

Lord MANSFIELD, — (after stating the facts of the case, and the different points which had been agitated,) — I allowed the plaintiffs to recover their share of the dividend against the assignees, as money positively and expressly paid into the hands of the assignees for their use. We are all of opinion, that the direction was right, that the action was maintainable, and that, after a debt is liquidated before the commissioners, it cannot be litigated but by an application to the Great Seal. Mr. Justice BULLEN desires it may be understood that he concurs in this opinion.

The rule discharged.

The End of EASTER Term 20 Geo. III.

R E P O R T S

O F

C A S E S

ARGUED AND DETERMINED

In the Court of King's Bench,

I N T H E

Nineteenth, Twentieth, and Twenty-first Years
of the Reign of GEORGE III.

By SYLVESTER DOUGLAS, Esq.
OF LINCOLN'S INN.

THE THIRD EDITION, WITH ADDITIONS.

0 P A R T II.

*Equidem cum colligo argumenta causarum non tam ea numerare soles
quam expendere.*

CICERO.

D U B L I N :

PRINTED FOR P. BYRNE, No. 108, GRAFTON-STREET.

1795.

REPORT

OF THE

COMMISSIONERS OF THE

LAND OFFICE

IN RESPONSE TO A

RESOLUTION OF THE

HOUSE OF REPRESENTATIVES

PASSED MAY 10, 1854

[411]

C A S E S
 ARGUED and DETERMINED
 IN THE
 Court of KING's BENCH,
 IN
 Trinity Term,

In the Twentieth Year of the Reign of GEORGE III.

STRACY and Another, Assignees of BISHOP, a
 Bankrupt, against HULSE and Others.

1780.
 Tuesday, 30th
 May.

THIS was an action of trespass against *Hulse* and *Benyon*, two justices of the peace, and *Barthrop* an excise-officer. It was tried at the last assizes for the county of *Essex*, before *ASHHURST, Justice*, when a verdict was found for the plaintiffs, with 59*l.* 6*s.* 4*d.* damages, subject to the opinion of the court, on a case which stated as follows :

A commission of bankrupt was issued against *Bishop*, (who was a candle-maker,) on the 4th of *February*, 1779, and his estate assigned to the plaintiffs on the 17th of that month; the act of bankruptcy having been committed on the 29th of *January* preceding. On the 4th of *March*, an information was exhibited against him, before the defendants *Hulse* and *Benyon*, for not paying 29*l.* 13*s.* 2*d.* the single duties then due and payable, for candles made by him, between the 9th of *November* and the 23d of *December* 1778. On the same day on which the information was exhibited, he was served with a summons to attend the justices on the 6th of *March*, which he did; and then acknowledged, that the single duties were due, and unpaid; whereupon they convicted him in the penalty of double duties, amounting to 59*l.* 6*s.* 4*d.*; and issued their warrant to the defendant *Barthrop*, and another excise-officer, "authorising and commanding them, and every of them, "that upon all the candles, and all the materials and utensils "for making of candles, in the custody of *Bishop*, or any "person or persons in trust for him, they should levy the sum

If a candle-maker, being in arrear for the single duties, becomes a bankrupt, and is convicted after the assignment of his effects; the double duties are a lien upon the candles, utensils, and materials, in the hands of his assignees; and they may be distrained.

[412]

1780.

STRACY
against
HULSE.

“ of 59l. 6s. 4d. recovered against him, for a certain offence committed by him against the laws and statutes of excise, whereof he stood convicted ;” then directing a sale, if they should not be redeemed within six days ; and if there should be any overplus, to render it to *Bishop*. By virtue of this warrant, the officers distrained the goods in the declaration mentioned, (being *candles, materials and utensils,*) which were before, and at the time of, the distress, in the possession of the plaintiffs, as assignees. When *Bishop* appeared before the justices, he informed them, that he was a bankrupt, and could not pay the duty ; and that his effects had been assigned, under the commission, to the plaintiffs. After the distress, the plaintiffs tendered the single duties to *Barthrop*, which he refused to accept.

The question was, “ Whether the said goods were liable to be distrained for the said double duties under the circumstances of this case ?”

There were two arguments ; the first in *Easter* term last, on *Friday*, the 21st of *April*, by *Mingay*, for the plaintiffs, and *Erskine*, for the defendants ; the other this day, by *Morgan*, for the plaintiffs. *Peckam*, was for the defendants, but the court thought it unnecessary to hear him.

The question turned upon the construction of certain clauses in the statutes of 12 *Car. 2. c. 24.* 15 *Car. 2. c. 11.* and 8 *Anne, c. 9.*

By 12 *Car. 2. c. 24. § 45.* the justices are authorised and required to issue warrants for levying the forfeitures, penalties, and fines, imposed by that act, (which relates to the excise on beer and other liquors) on the goods and chattels of the offender ; and to cause sale to be made of the said goods and chattels, (if not redeemed within a limited time,) rendering to the party, the overplus, if any be.

By 15 *Car. 2. c. 11. § 13.* all the brewing vessels, and utensils for brewing, into whose hands soever they shall come, and by what conveyance or title soever they shall be claimed, shall be liable and subject to, and are thereby charged with, all the debts and duties of excise, in arrear, and owing by any person or persons, for any beer or ale made within the said brewhouse ; (that is, the brewer's common and usual brewhouse (a) ;) and shall also be subject to all penalties and forfeitures incurred by such person or persons, so using the said brewhouse, for any offence against the laws and statutes for excise ; and it shall be lawful, in all cases, to levy debts and penalties, and use such proceedings against the utensils therein contained, as it might be lawful to do, in case the debtor or offender using the utensils, had been truly and really the owner and proprietor of the same.

By 8 *Anne, c. 9.* (made perpetual by 9 *Anne, c. 21. § 7.*) the excise on candles was introduced ; and by § 9. of that act,

act, all makers of candles, who shall refuse or neglect to pay the duties, are to forfeit double the sum.

1780.

The same statute, § 19. enacts, that all the *candles, and all the materials and utensils* for the making of candles, in the custody of any maker or makers of candles, or of any person or persons, to the use of, or in trust for, such maker or makers of candles, shall be liable and subject to, and are thereby made chargeable with, all the debts and duties, for candles, in arrear, and owing by such maker or makers, for any candles by him, her, or them, or in his or their working house, or places aforesaid, (enumerated § 6.) made, and shall also be subject to all penalties and forfeitures incurred by such person or persons so using such work-house, or other place, for any offence against this act, relating to the said duties upon candles; and that it shall and may be lawful, in all such cases, to levy debts and penalties, and use such proceedings, as may lawfully be done by this act, in case the debtor or offender were the true and lawful owner of the same.

STRACY
against
HULSE.

And, by § 27. it is enacted, "That all and every the powers, authorities, directions, rules, methods, penalties, forfeitures, clauses, matters, and things, which in and by 12 Car. 2. c. 24. or by any other law now in force, relating to the revenue of excise upon beer, ale, or other liquors, are provided, settled or established, for managing, raising, levying, collecting, regulating, or recovering, adjudging, or ascertaining the duties thereby granted, or any of them, (*other than in such cases, for which other penalties and provisions are made and prescribed by this act,*) shall be exercised, practised, applied, used, and put in execution in and for the managing, levying, collecting, mitigating, recovering, and paying the said duties upon candles hereby granted, as fully and effectually, to all intents and purposes, as if all and every the said powers, &c. were particularly repeated, and again enacted in the body of this act."

[414]

After the first argument, BULLER, *Justice*, observed, that it was clear the action would not lie against the *justices*; because the warrant followed the words of the act of parliament; and therefore, if the goods distrained were not liable, the officers had acted without any authority. The rest of the court seemed to be of the same opinion, and the counsel for the plaintiffs gave the case up as to the defendants *Hulse* and *Benyon*.

But, with regard to the legality of the distress, they insisted, that, as the assignment had been made before the conviction, the goods were no longer in the custody of the maker, nor of any body in trust for him, but in the hands of the assignees as trustees for the creditors; and, therefore, they were not liable to be distrained under the 19th section

1780.

STRACY
against
HULSE.

of 8 Anne, c. 9. This section differed, they said, materially from 15 Car. 2. c. 11. § 13. which subjects brewing utensils to the duties and penalties *into whose hands soever, or by whatever title, they should come.* There might be a good reason for the difference between the two provisions. By 15 Car. 2. the beer and materials are not made liable; and as to the brewing utensils, they are of a bulky nature, and of great value, not liable to be often sold or transferred; and, therefore, purchasers might be expected to enquire what liens there are upon them; whereas, candles, and materials for candles, are the daily subjects of sale; and it would be highly inconvenient, if they could be followed for the duties and penalties into the hands of third persons. If the law were so, no person could safely purchase candles, or any thing employed in making them, in open shops. The 27th section of the statute of Queen Anne did, indeed, extend all the penalties and modes of recovery mentioned in former excise laws to the case of candles; but, by the exception in the same section, this was only to be in cases for which no penalties or provisions were enacted by the statute of Queen Anne itself; and the present was a case where a new provision was made by that act; the candles and materials being thereby rendered liable, which beer, or the materials for brewing, are not by the act of 15 Car. 2. The 19th section of the act of Queen Anne, only meant to give the King the same remedy *by distress* for the duties and penalties, as he had at common law, or under the statute of 33 Hen. 8. c. 39. by a writ of extent; and as an extent does not, in the case of bankruptcies, attach on the goods, if issued after the assignment, nor, in the case of actions, if after judgment; (which last point was settled in the late case of *Uppom v. Somner* in the *Common Pleas* (a);) so here the assignment being previous to the conviction and warrant of distress, the goods were not liable. Indeed the very clause in the warrant, directing the overplus to be paid to *Bishop*, showed, that this distress could not be justified; for how could he be entitled to the overplus of goods not his property, but vested in the assignees to be distributed among his creditors?

On the part of the defendants, the law with regard to extents was admitted to be as stated; but it was said, that it could not affect this question, which depended on the words of the excise acts; and that there was no substantial difference between the two clauses of 15 Car. 2. c. 11. and 8 Anne. c. 9.; or, if there was, the general provision in § 27. of the act of Queen Anne, extended every remedy given by the one to cases under the other. That the general policy of all the excise laws, is to give a lien upon the

(a) C. B. H. & E. 19 Geo. 3. 2 Blackst. 1251. 1294.

the subject-matter of the duty, and the utensils employed ; and with regard to malt, (the first act concerning which was 13 Will. 3. c. 5.) it had been decided by the court of *Exchequer* in two different cases, viz. the *Attorney General v. Senior*, and *Rex v. Fowler*, that, though there has been an assignment under a commission of bankrupts, it continues liable in the hands of the assignees.

Lord MANSFIELD, — This case, by admission, gives up a great part of the argument we have heard ; for it admits, that the goods in the hands of the assignees, were liable to the single duties. We think the question depends entirely on the 19th section of the act of Queen Anne ; and it is clear, by that section, if the goods distrained were liable to the single duty, that they also were to double duty. The question therefore is, whether the assignees do not, by priority, stand in the place of the bankrupt as to all the rest of the world. They are his representatives. Every equity that would affect him, they are liable to. If he has pledged, they must redeem. They cannot have the wife's *chose in action*, without making a provision for her. The case of *third persons*, who have bought candles, is very different. The warrant does not reach them. This is not a new question. It has been repeatedly determined in the *Exchequer*, that as to this sort of lien, the assignees and the bankrupt are the same. The cases of the *Attorney General v. Senior* (1), and *Rex v. Fowler* (2), are in point.

The *Posse* to be delivered to the defendants.

(1) That was an information, in the court of *Exchequer*, in 1739, by the *Attorney General*, (Sir Dudley Ryder,) against *Senior*, a bankrupt, and his two assignees ; which set forth, that *Senior*, (being a maltster,) between June 1737, and the May before the filing the information, made malt for sale, for which a duty of sixpence a bushel ought to have been paid ; and that, in January 1737, a commission of bankruptcy issued against him ; that, at the time of his bankruptcy, he was indebted in divers sums for duties on malt, and was possessed of several quantities of malt, for which no duties had been paid ; that the assignees had disposed of that malt, part of which had been charged with the duty by the officer, and part not ; and that the duty for the same was still owing ; that the assignees had been applied to for payment, and had neglected to pay, and refused to discover the quantity they

had possessed themselves of, and praying a discovery of the quantity of malt the bankrupt was possessed of at the time of the bankruptcy, and whether the same was then charged with the duty, and how much malt came to their hands for which no duty had been paid, and how much the duties amounted to, and that they might pay the same to the King's use.

The bankrupt, by his answer, admitted, that at the time of his bankruptcy he was indebted for malt duties 93*l.* and was then possessed of 724 bushels of malt, which was surveyed and charged with the duty, but no part thereof paid. The assignees said, that an assignment was made to them on the 24th of January ; that they possessed and sold 724 bushels of malt, the duty on which amounted to 18*l.* 12*s.* ; that they had no notice of the debt due to the Crown, until after they had sold the malt ; that, afterwards,

1780.

STRACY
against
HULSB.

[416]

1780.

STRACY
against
HULSE.

wards, they had notice, but refused to pay, not thinking themselves liable; that, by the bankruptcy and assignment, they were advised the property of the plaintiff's effects were divested from him, and legally vested in them, without notice of the King's debt, and before any step was taken on his behalf to affect the property, or render the bankrupt's effects liable to the demands of the Crown.

The *Attorney General* replied; and, on hearing him, and the *Solicitor General*, for the Crown, and Mr. *Booth*, and Mr. *Wilbraham*, for the defendant, it was referred to the Deputy Remembrancer, to examine, and report to the court, what quantity of malt had come to the hands of the assignees which belonged to the bankrupt, and to take an account of the value thereof, and likewise of what money was in arrear from, and due and unpaid to his Majesty by, the bankrupt, for the duties on the said malt; or on any other, and what quantity of malt made by him at the time when the assignees took possession of the malt belonging to him—all just allowances to be made—the cause to continue in the paper till the report.

On this order the assignees submitted, and paid the duty, and no farther proceedings were had.

(2) The case of *Rex v. Fowler* came on in 1779. On the 19th of May, 1778, a commission of bankrupt issued against *Fowler*, who was that day found a bankrupt, and a provisional assignment executed to the messenger. On the 20th of May an extent issued against him, upon an inquisition taken that morning, for above 2300*l.* due for malt duties, directed to the sheriff of *Suffolk*, who, by virtue thereof, entered on the bankrupt's premises, and seized upwards of the value of 2300*l.* The assignees applied to the solicitor of the *Exchequer*, and to the sheriff to withdraw the extent, and deliver up the malt. This not being done, they presented a memorial to the commissioners,

requesting that the money arising from the sale of the [417] malt might be paid over to them, the malt having been sold by the sheriff under a writ of *Venditioni exponas*, which had issued on the return of the extent. Upon this a rule was made by the court of *Exchequer*, on the motion of Mr. *Kenyon*, that the *Attorney General* should shew cause, why the assignees should not be at liberty to enter their claim of property to the malt, notwithstanding the time for so doing was expired; and to plead to the writ of extent, the money in the mean time to remain in the sheriff's hands.

The *Attorney General* did not mean to shew cause; so that the assignees would have pleaded, and the matter have come before a jury; but none of the facts being disputed, it was agreed, that the *Attorney General* should bring on the question on the validity of the extent, in the form of shewing cause.

The counsel for the assignees relied on the effect of the assignment under the commission of bankruptcy, and the change of property. They admitted, that they were liable for the duties on the malt of which they possessed themselves; but, as to other duties in arrear, they contended they were not liable. They relied also on the difference in the words of 15 *Car. 2. c. 11. § 13.* with respect to the excise on beer, by which it is enacted, "That all" and every the brewing utensils, into "whose hands soever they shall come, and by what conveyance or title they shall be claimed, &c." and those of 13 *Wil. 3. c. 5. § 18.* (the first statute imposing a duty on malt,) which were not, they said, of so extensive an import.

For the Crown, the case of *Rex v. Senior*, and several other determinations of the same sort, were cited: And

The court determined, that the extent was legal; and that the malt in the hands of the assignees was liable to all the duties in arrear; and the rule was discharged.

The 18th section of 13 *Wil. 3. c. 5.* (the provisions of which act have been renewed

renewed annually since 1 *Anne*, st. 2. c. 3.) is as follows: "All malt in the custody of any maker of malt, shall be liable and subject to, and are hereby made chargeable with, all and singular the debts and duties of malt in arrear, and owing by any person or persons for any malt made by such maltster, or within his malt-house; and shall also be subject to all penalties and forfeitures incurred by such person or persons so using such malt-house, for any offence a-

gainst the laws relating to the duties on malt; and it shall be lawful in all cases to levy debts and penalties, and use such proceedings against such malt as it may be lawful to do in case the debtor or offender were the true and real owner of the same malt."—The 17th section is in the same words, *mutatis mutandis*, with the 27th section of 8 *Anne*, c. 9.

1780.

STRACY
against
HULSE.

BURNELL against MARTIN.

Tuesday, 30th
May.

MOTION, by *G. Wilson*, for a rule to shew cause, why the defendant should not be discharged out of custody on filing common bail, upon an affidavit, stating, That, having borrowed 300*l.* of the plaintiff, he had given him by way of security, a mortgage of a term for forty-five years of an estate let at 40*l.* a year, and also a bond; that the interest being in arrear, the plaintiff had filed a bill of foreclosure, had soon after got into possession of the estate, and had served the defendant with a *subpœna* to hear judgment as on the 29th of May; after which service he had arrested him in an action on the bond in this court; and that the mortgaged premises were an ample security for the debt. Lord *MANSFIELD* said, the motion could not be complied with, for that it had been settled over and over again, that a person, in such a case, is at liberty to pursue all his remedies at once; and the rule was refused.

A party having a mortgage and also a bond, as a security for the same debt, may bring an action on the bond, and arrest the defendant, pending a suit in equity for a foreclosure.

[418]

The KING against the Inhabitants of FRAMPTON ON SEVERN.

Wednesday,
31st May.

TWO justices removed the wife and child of *Samuel Minnett*, (he having left them,) from *Frampton* to *Tretherne*. On an appeal to the quarter-sessions for *Gloucestershire*, the order of removal was quashed, by an order now removed into this court, which stated as follows:—In the year 1751, the parish of *Tretherne* granted a certificate to the parish of *Frampton on Severn*, acknowledging *Job Minnett*, and *Ann* his wife, to be settled in *Tretherne*, under which certificate they lived in *Frampton* till the latter end of 1753, or the beginning of 1754, when they voluntarily returned to *Tretherne*, and had afterwards a son, named *Samuel*, born there, *Job Minnett*, the father, continued to live in *Tretherne*, for 17 or 18 years; when, having a relation in *Frampton* dead,

A certificated person having returned to the certifying parish, and remained there 18 years, a son who was born to him there, during that time, being hired and serving a year in the parish certified to, gains a settlement by such hiring and service.

1780,

The KING
against
FRAMPTON.

he went by himself, (his wife being dead,) to possess himself of the effects, and remained there about six months, when being taken ill, he was, by the parish of *Tretherne*, recommended to *Gloucester* Infirmary, and there died. But before he went to *Frampton*, to take possession of his relation's effects, *Samuel*, the son, was hired for a year to *Robert Virry*, in *Frampton*, and lived with him for two or three years. On going out of *Virry*'s service, he was hired again in *Frampton*, to *Richard Clutterbuck*, and lived with him for two or three years, and till after his father died. The son afterwards married, and had a child, and his wife and child were the paupers who were removed by the two justices.

Dunning had begun to shew cause why the order of sessions should not be quashed, and cited *Rex v. Sowerby* (a), and *Rex v. Taunton St. Mary Magdalen* (b), but Lord MANSFIELD directed the counsel on the other side to go on.

[419]

Howorth, and *Clyfford*, in support of the order of removal, observed, that, in the case of *Rex v. Taunton*, the circumstances were very particular. The extraordinary length of time during which the certificate had slept, was considered as a waiver of it: but they seemed to doubt the law of that case. It had been settled, they said, in later cases, (as in *Rex v. Spotland*) (c), that a voluntary removal of a certificated person from the parish to which he has been certified, will not vacate the certificate; and this without any regard to any interval or length of time. If a pauper can, by length of time, desert and annul a certificate, how is the line of limitation to be drawn? If a month's absence from the parish will not do, will a year, or 10 years, or 18 years? By analogy to the statute of limitations, 20 years, at least, ought to be required. Here, the certifying parish did not look upon the certificate as at an end; for they recommended the father to the *Gloucester* Infirmary, considering him still as their parishioner.

Lord MANSFIELD, — The exact circumstances of this case have not occurred before, though the principle of desertion, by long disuse, is to be found in that of *Taunton*. But, here, there was no faith given by the parish of *Frampton* to the certificate, as to *Samuel*, whom they never heard of till he came there as an emancipated person. The case seems to be much stronger than that of *Taunton*.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, — I am of the same opinion. There are no reasons stated for the judgment in *Rex v. Spotland*, and it does not appear, either that the court meant to contradict, or that the decision did contradict, the case of *Rex v. Taunton*.

The order of sessions confirmed.

(a) *H. 24. Cap. 2. Burr. Settl. Ca.*
No. 130.

(b) *T. 29 & 30. Geo. 2. Ib. No. 129.*

(c) *H. 5. G. 3. Burr. Settl. Ca. No. 170.*

FURLY *against* NEWNHAM.

1780.

Wednesday,

31st May.

The court will not grant a *habeas corpus ad testificandum* to bring up a prisoner of war.—If a party refuse to consent to the examination of a witness to an essential fact by commission, where his presence cannot be obtained, or to admit the fact, the court will assist the other party, by putting off the trial.

* [420]

IN last Hilary Term, Baldwin had moved for a writ of *habeas corpus ad testificandum*, to bring up an American, who was a prisoner in the Mill prison at Plymouth, to give evidence on the part of the plaintiff, in an insurance cause, he being the only witness in England, who could prove the capture. The court thought there could be no *habeas corpus* to bring up a prisoner of war; and the Solicitor General mentioned a case where ASTON, * Justice, had delivered an opinion to that effect. Lord MANSFIELD said, the presence of witnesses under like circumstances, was generally obtained by an order from the secretary of state. But it seems application had been made for such an order in this case, without success. Afterwards, (in this term,) a rule was granted, to shew cause, why the defendant should not consent, either to admit the fact of the capture, or that the prisoner should be examined on interrogatories. If this consent should be refused, the court said they would put off the trial, from time to time, to give the plaintiff an opportunity of filing a bill in equity.

This day, the first part of the rule was made absolute, the plaintiff agreeing to produce all the letters he had received concerning the matter in litigation.

The KING *against* COLES.

Wednesday,

31st May.

AN attachment had issued against Coles, late sheriff of Southampton, for not returning a writ. Afterwards, Cowper obtained a rule to shew cause, why the attachment should not be superseded, on the ground that the rule to return the writ had only been served on the under-sheriff's agent in town.

If a rule be obtained against the sheriff to return a writ, service on the under-sheriff's agent in town, is not sufficient.

Runninton now shewed cause, and stated, that it was the constant practice to serve rules directed to the sheriff of London, Middlesex, and Surry, only on the agents.

This was admitted on the other side, but the practice was said to be founded on this, that the offices of the agents for the under-sheriffs of those counties, are, in truth, considered as the offices of the under-sheriffs themselves; but, if the rule were served on the agent, any where but at the office, the service would be bad even in the cases of London, Middlesex, and Surry. Besides, as six days were only given, after the service of the rule, to return the writ, it would be impossible to obey it in distant counties, if service on the agent were sufficient.

The rule made absolute.

1780.

Thursday,
1st June.The KING against TOWNSHEND, and
Another.

If a parish, consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the court will consider it as being substantially the conviction of the one district, and if the fine be levied on an inhabitant of the other, will grant a special mandamus for a rate to be levied on the district bound to repair the indicted part of the road.

THE parish of *Kingsley*, in *Staffordshire*, consists of two districts, or townships, viz. *Kingsley* and *Wiston*. An indictment had been preferred against the parish, for not repairing the highway running through it, to which there was a plea of not guilty; and the parish had been convicted, and a fine imposed. This fine was levied upon one *Morris*, an inhabitant of the township of *Wiston*; but it was now sworn, on the part of the inhabitants of that township, that they had no notice of the indictment, the defence being made only by the other district; and that the part of the road which was out of repair, lay entirely in that other district. These facts were contradicted, (though not very directly,) by the affidavits on the other side. *Morris* having applied to the justices in their special sessions, under the provision for that purpose, in the late general highway act (a), a warrant was there made for a rate, (to reimburse him,) on the inhabitants of the township of *Kingsley*, which rate having been made and confirmed by two justices, and the court of King's Bench having been moved for a *mandamus* to the surveyor of that township to collect and levy it on the inhabitants thereof, a rule to shew cause was granted, which was argued this day, by *Bearcroft*, and *Cowper*, against the rule, and *Dunning*, in support of it.

It appeared, from the affidavits on the part of *Wiston* township, that the inhabitants of each of the two districts are bound, by prescription, to repair only such part of the highway as is situated in their respective districts.

Against the rule for a *mandamus*, it was argued, that, as the indictment and conviction were of the whole parish, the rate was void, for that the justices were only authorised by the act to direct a rate to be made on the parish, township or place, presented or indicted. If the township of *Wiston* was intitled to the exemption they now claimed, they ought to have appeared, and pleaded specially to the indictment.

Lord MANSFIELD absent.

[422] WILLES, and ASHHURST, Justices, were of opinion, they they were not so tied down by the wording of the statute (b), but that they might construe it agreeably to the justice of the case in the present instance. That the words would admit of such construction. That, as it

(a) 13 Geo. 3. c. 78. § 47;

(b) § 45 & 47.

was sworn directly on the part of *Wiston* township, (and not expressly denied on the other side,) that they had no notice of the indictment, and that the inhabitants of *Kingsley* township alone had taken the defence upon them, it ought to be considered as being substantially an indictment merely against *Kingsley*.

1780.

The King
against
TOWNSEND

BULLER, *Justice*, concurred; but thought the *mandamus* must be a special writ, suggesting that the part of the highway, which was the subject of the indictment, lay wholly in *Kingsley* township, and that the two townships were separately bound to repair their respective parts of the highway, in order to give the inhabitants of *Kingsley* an opportunity to traverse, by the return, either of those facts.

To this the two other judges assented.

The rule made absolute.

READ *against* WILLAN.Friday,
2d June.

Indebitatus assumptus, for hay, straw, and stable-room, found for horses belonging to the defendant. The cause was tried at the last *Lent* assizes for the county of *Kent*, before ASHHURST, *Justice*, when a verdict was found for the plaintiff, with 17*l.* 2*s.* damages, subject to the opinion of the court on a case which stated;

Horses employed in drawing artillery are billeted under the mutiny act, whether they belong to the ordnance or are furnished for the service by contract.

That it appeared, upon the trial, that the plaintiff was an innkeeper at *Rocheſter*; that the defendant was a contractor with the Board of Ordnance, for supplying horses for the royal train of artillery, under a contract then subsisting with the Board for that purpose; that two contracts were given in evidence; that, on the 10th of *November*, 1778, five horses, the property of the defendant, and marked with the initials of his name, and with the initials of the King's name, and the crown, on the left flank, were billeted on the plaintiff, at his inn at *Rocheſter*, upon their return from the service of drawing the artillery and ammunition for part of the army at *Coxheath* camp, under a route received from the commander in chief at *Coxheath*, which was produced in evidence; that the horses continued under the same billets till the 5th of *June*, when they were attached to another regiment on actual service. It further appeared in evidence for the defendant, that, in the years 1745, 1746, and 1747, when the artillery marched with the army into *Scotland* during the rebellion, the horses drawing the artillery, were uniformly billeted in the same manner as the dragoon horses, and other horses of the army; and that, in the year 1756, the horses drawing artillery and ammunition waggons, though not in company with troops, were billeted like other

[423]

1780.

READ
against
WILLAN

other horses of the army under the mutiny act. No evidence was given on the part of the plaintiff to contradict the defendant's evidence.—The question stated for the opinion of the court was, Whether the defendant, under the above circumstances, had a right to billet the horses upon the plaintiff, in the same manner, and at the same rate, as the horses belonging to the light horse and dragoons are billeted under the mutiny act (a). If the court should be of opinion, that the defendant had not that right, then the plaintiff to be at liberty to enter up judgment on his verdict for the 17*l.* 2*s.* and costs; but if the court should be of opinion, that he had a right, then the verdict and judgment to be entered for 11*l.* 6*s.* 9*d.* and costs.

The case was this day argued, by *B. Hunter*, for the plaintiff; and *Erskine*, for the defendant.

Hunter divided his argument into four heads of objection; contending, 1. That the mutiny act, being in derogation of the common rights of the subject, ought not to be extended by construction beyond the strict letter; and that no billeting of any sort is legal, without it is expressly authorized by act of parliament; as was manifest from the petition of rights (b), the statute of 31 *Car.* 2. c. 1. § 54. that of 30 *Geo.* 2. c. 2. which was necessary, in order to authorize the billeting of the *Hessian* troops, who were brought over for the defence of this country in the last war, and the 80th section of the very act on which the present action arose (c); which contains a similar provision relative to *American* troops in the service of this country, and sent over here. 2. That artillery horses are not within the reason and spirit of the act, as dragoon horses are; for that, as to the latter, they could not be separated from the soldiers, without great inconvenience and confusion. 3. That the defendant's horses were not on a march, but in winter quarters; and, if the act could be extended to artillery horses when on actual service, it could not apply to horses not in actual employment. 4. That, supposing the board of Ordnance to have the power of billeting in such cases, that power could not be extended to a contractor, like the defendant; for the Board, it might be supposed, would exercise such an authority without fraud or abuse, to which a private contractor would have many temptations.

Erskine, on the other side, contended, that the real question before the court was, whether horses drawing the artillery are within the true meaning of the provisions in the mutiny act; and that the circumstance of their being furnished

(a) 19 *Geo.* 3. c. 16.

(b) 3 *Car.* 1. c. 1. § 6.

(c) In the mutiny act of 20 *Geo.* 3. c. 12. it is § 79.

1780.

READ
against
WILLIAM.

furnished by contract did not vary the case. By the common law, he said, soldiers were billeted in the most oppressive manner, without any restriction as to the time, the number, or subsistence; but this mischief was remedied by the petition of right, and the subsequent acts relative to this subject. Can it be argued, that there is no authority to billet horses? The reasoning on the part of the plaintiff might be employed in support of that proposition; for, in the enacting part of the statute, concerning billeting, there is no notice taken of horses of any sort. The only words are, "The officers and soldiers in his Majesty's service (a)." But the billeting the horses, was considered by the Legislature as a consequence; and accordingly, by a subsequent clause, after reciting, that great inconveniencies have arisen, and may arise, in such places where horses or dragoons are or may be quartered, by the billeting of the men and *their horses* at different houses, contrary to the true intent and meaning of the act, it is enacted, "That in all places where horse or dragoons shall be quartered, the men and *their horses* shall be billeted in one and the same house, &c. (b)." So, in the clause regulating the rate of subsistence, there is a particular provision, fixing the allowance for each horse (c). There can be no doubt, therefore, that *dragoon horses* may be billeted; and, by the 78th section (d), it is expressly declared, "That the officers and persons employed in the several trains of artillery, shall be, at all times, and in all respects, within the intent and meaning of every part of the act (e);" the drivers therefore are clearly billetable; and how strange an interpretation would it be, to hold that *they* are, and that *their horses* are not! It is said, that this statute ought not to be extended beyond the strict letter; but this, like all other statutes, must, while in force, receive a construction consonant to the true intent and meaning of the Legislature; and, as to the present question, the practice in the year 1745, as found by the case, is clearly explanatory of the intention. Frequent instances cannot be expected. Artillery are not wanted, unless in cases of rebellion, or invasion, and indeed the section last mentioned relative to the trains of artillery was not introduced till the year 1740, or 1741; for it is not found in the mutiny act of 1739. As to the contract, it is a great public benefit, since it enables the Board of Ordnance to save the expence of

[425]

(a) 19 Geo. 3. c. 16. § 26. p. 369.

(c) 19 Geo. 3. c. 16. § 37. p. 376.

(b) Same § of 20 Geo. 3. c. 12. and § 22 of

20 Geo. 3. c. 12. § 37. 4 Geo. 3. c. 3.

4 Geo. 3. c. 3. which is the mutiny act

§ 33.

printed in Ruffhead's Statutes.

(d) p. 401.

(e) 19 Geo. 3. c. 16. § 31. p. 373.

(e) 20 Geo. 3. c. 12. § 77. 4 Geo.

20 Geo. 3. c. 12. § 31.

3. c. 3. § 73.

1780.

READ
against
WILLAN.

of maintaining horses unless when they are actually wanted. By the present contract, which was given in evidence, and is referred to by the case, the defendant is bound to keep and maintain his horses at his own expence, and to keep them in readiness till called out, (the ordnance giving ten days notice); but, when they are mustered, they are to be paid for at the same rate with dragoon horses. It is said, that the defendant's horses were in winter quarters. That is immaterial. The question is, whether they were mustered, and in actual service, of which there can be no doubt; for it is stated, that they were under a route from the commander in chief; and, by the contract, they are to continue in service for 50 days certain, and until a written notice from the ordnance.

Hunter, in reply, insisted, that, in the subsistence clause, *all* billetable horses were meant to be specially enumerated, and artillery horses are not mentioned. He observed, that, in 1745, the artillery horses were billeted only during the march and actual employment of the artillery, and that it could not be necessary that horses should be kept at the expence of the subject from *November* till *June*, in order to be employed in *June*.

Lord MANSFIELD, — The facts of this case only give room for the question, whether artillery horses are intitled to be billeted; and I think the affirmative has been argued on unanswerable grounds. The dragoon horses are not mentioned, expressly, in the enacting part, but the horses and men are considered as inseparable. It is no wonder that there was not, at first, any provision about the artillery, because it is so seldom wanted. But the clause introduced in 1740 is decisive. It mentions particularly the *payment of quarters*, which must extend to the horses as well as the men employed. The reason certainly extends to them. Horses are more necessary for artillery than for dragoons, because the artillery cannot possibly be made use of without them. The circumstance of their being hired under a contract does not alter the question.

WILLES, *Justice*, — Under the distinction that these horses were mustered, and to be considered as in actual service, (which I think, upon the case stated, they were,) I am of opinion they were billetable. Otherwise I should think they were not.

ASHHURST, *Justice*, of the same opinion.

BULLER, *Justice*, — I am of the same opinion. I think the 78th section has the same operation as if artillery horses had been mentioned in all the former parts of the act.

The verdict to be entered for 1*l.* 6*s.* 9*d.* only.

1780.

The KING against COZENS and Another.

Saturday,
3d June.

When a justice of the peace acts from indirect or corrupt motives, the court will punish him by information.—If a landlord tender the poor-rate for his tenant, the overseers must receive it, and a warrant ought not to be granted to distrain upon the tenant.

THE right of electing members to serve in parliament for the Borough of *Dorchester*, in *Dorsetshire*, according to the last resolution of the House of Commons (a), "is in the inhabitants of the said borough paying to church and poor, in respect of their personal estates; and in *such persons* as pay to the church and poor in respect of their *real estates* within the said borough." It is a pretty general practice in the western parts of *England* for the *owners* to pay the poor-rate instead of the *occupiers*, who are the persons rateable under the statute of *Elizabeth* (b). On a petition, complaining of an undue election of members to serve in parliament for *Dorchester*, which came on to be tried before a select committee, appointed under the statute of 10 *Geo. 3. c. 16.* on the 22d of *February* 1775, it was contended, by the counsel for one of the parties, that "*such persons as pay*" in the words of the last resolution, ought to be construed to mean such persons as by law were bound to pay, and that the landlord ought to be considered as the mere agent of the occupier, and as paying for him, so as to confine the right of voting to *occupiers*. The committee, however, determined, upon evidence of the usage, both before, and since, the date of the resolution, "That such persons as pay in respect of their real estates, *though not inhabitants* or *occupiers*, have a right to vote in that borough (c)."

[427]

In consequence of this determination, there was, previous to the last general election, a great struggle in the borough, whether the poor-rate should be, in fact, received from the landlords, or the occupiers. The occupier of a particular house having been rated by name, he was summoned by the defendants, who were two justices of the peace for *Dorchester*, to shew cause why he should not pay the rate. On the day for shewing cause, the overseers of the poor attended, and also a person who was the grandson of the owner of the house, and who, in the presence of the defendants, tendered the sum assessed to the overseers. The defendants asked him *who* he tendered it for; to which he answered, he tendered it for his grandfather. They then asked him, "Don't you tender it for the occupier?" To this he answered, "No; I tender it for my grandfather." The defendants then asked the overseers, if they would take the money? which they refused to

(a) 18th May, 1770, Journals, vol. 1. p. 363. col. 2. *Vide* 2 *Geo. 2.* c. 24. § 4.

(b) 43 *Eliz. c. 2. § 1.*

(c) *Cases of Contr. Elect.* vol. 1. p. 358.

1780.

The KING
against
COZENS.

to do; and thereupon the defendants immediately granted a warrant (*d*) to distrain for it on the goods of the occupier. By the lease, the landlord had expressly stipulated to pay the poor-rate.

This was an application for an information against the defendants, and, by the affidavits on the part of the prosecution, it was sworn, that they had acted, (according to the belief of the prosecutor,) from corrupt and criminal motives, and to serve election purposes. This was positively denied by the defendants, but their affidavit did not go on to state their reasons for granting the warrant.

The *Solicitor General*, *Morris* and *Rooke*, shewed cause.—*Dunning* for the prosecution.

Lord MANSFIELD,—No Justice of peace ought to suffer for ignorance, where the heart is right [✓]. On the other hand, when magistrates act from undue, corrupt, or indirect motives, they are always punished by this court. It is impossible for these defendants to excuse themselves upon the ground of ignorance. In many parts of the kingdom the landlord pays the poor-rate for his tenants, and it is sworn, that the landlord in question had actually paid 28 rates before this, without any objection or difficulty being raised. What possible reason could there be for raising one now, for the first time? The justices must have acted with a view to make a point to serve the purpose of an election.

The court proposed, that, upon the defendants' undertaking to pay the whole costs out of pocket incurred by the application, the rule should be discharged, which was accordingly done.

(*d*) 43 *Eliz. c. 2. § 3.*

[✓] Even where he acts illegally.

Rex v. Palmer, *E. 1. Geo. 3. 2 Bar.*
1162.

Tuesday,
6th June.

SMITH and Others against DOVERS.

In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence of such agreement, the plaintiff may traverse the corrupt agreement, and conclude with a verification.

ACTION upon a bill of exchange for 8*l.* payable 4 days after date, against the acceptor.—*Plea*, That had been corruptly, and against the form of the statute agreed, on the 25th of *October*, between one *Sowden* and one *Robinson*, and the defendant, that *Sowden* and *Robinson* should lend to the defendant 80*l.* and should bear and give day of payment thereof to the defendant from thence till the 20th of *December*, and that for forbearance he should pay 5*l.*; that after, and in pursuance of this agreement, on the said 25th of *October*, the defendant advanced the 80*l.* and that, for the securing that sum the 5*l.* it was afterwards, (*viz.* on the 1st of *November*)

1780.

SMITH
against
DOVERS.

[429]

being the day of the date of the bill, further corruptly, &c. agreed between them, that *Sowden* and *Robinson* should draw a bill for 85*l.* payable 50 days after the date to the plaintiffs; that, in fact, they did, after making the last mentioned agreement, and in pursuance thereof, and for the purposes aforesaid, draw such bill, and that such bill so drawn was the identical bill in the declaration mentioned; that the 5*l.* so agreed to be given, and so reserved and made payable, exceeded the rate of 5*l.* per cent. for one year, contrary to the statute; by means of which premises, and by force of the statute, the said bill was wholly void, and of no force or effect in the law.—*Replication*, (after a general protestation that the plea was insufficient,) That the bill was drawn by *Sowden* and *Robinson*, and delivered to the plaintiffs, for a good and valuable consideration, *without this*, that it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said *Sowden* and *Robinson*, and the defendant, in manner and form as the defendant had alledged, “and this the plaintiffs are ready to verify, wherefore, &c.”—*Special Demurrer*; For that, inasmuch as the said traverse in the said replication contained denies the whole substance of the plea of the defendant, as to the said premises and undertaking, no inducement to the same was necessary; nevertheless the plaintiffs have, by an unnecessary and superfluous inducement to such traverse, rendered a conclusion of the said replication with a verification to the court necessary [1]; whereas the said replication, (had the inducement to the said traverse been omitted,) might and ought to have concluded to the country, and the said plaintiffs have thereby calculated the said replication for the introduction of an unnecessary and vexatious length of proceedings; and also for that the inducement to the traverse, containing no new matter, is, in itself, immaterial, superfluous, and unnecessary, and tends to prolixity in pleading; and for that the said replication is in various other respects uncertain, insufficient, and informal.

Marshall, for the defendant.—Where matter is specially pleaded, in the affirmative on the one side, and in the negative on the other, a special traverse is unnecessary and improper,

[1] If the special traverse had, in truth, denied the whole matter of the plea, it might have concluded to the country, notwithstanding the introductory inducement, and the formal words, “*absque hoc*.” The contrary, indeed, is stated to have been said by the court in *Baynham v. Matthews*. But vide *Haywood v. Davies* (1 Salk.

4.) and *Robinson v. Raley*, (1 Bur. 317.) where this point came directly in question, on the pleadings to the 13th count of the declaration, and the conclusion to the country, though specially demurred to, was held good. Vide *supra*, also, *Boyce v. Whitaker*, p. 95. Note [10].

1780.

SMITH
against
DOVERS.

[430]

improper, because there is a sufficient issue joined, without carrying the plea any further. Here, the matter of the plea is fully denied in the replication, which, therefore, should have been without an inducement, and should have concluded to the country. But the plaintiff, by introducing an inducement, and a special traverse, has rendered it necessary to conclude his replication to the court, and put the defendant under the necessity of rejoining. The principle I contend for is established by the case of *Hugh v. Philips* (a), and recognized and confirmed by that of *Haman v. Truant* (b). *Baynham v. Matthews* (c), will perhaps, be cited on the other side, as an authority against me; but, if properly considered, that case will be found only to decide, that, where there is an inducement and a special traverse, the conclusion must be to the court; not that, in a case like the present, there ought to be such inducement and special traverse. On the contrary, the doctrine I am contending for is there expressly admitted by the court. The recent case of *Boyce v. Whitaker* (d), is also in point in my favour.

Cowper, for the plaintiffs,—In the case of *Haman v. Truant*, the allegations in the inducement, and in the traverse, were exactly the same thing, in different words, both denying the whole substance of the plea. In *Baynham v. Matthews*, the express determination was, that, where the statute of usury is pleaded, and the plaintiff replies, that the security was given for a just debt, and traverses the corrupt agreement, a conclusion to the country is bad, and, in *Robinson v. Raley*, (e), that case is cited, and DENNISON, *Justice*, there mentions both that and another of *Fen v. Alston* (f), as having decided, that where the statute of usury is pleaded, the plaintiff may, at his election, either reply, that the security was given upon another account, and specially traverse the corrupt agreement, or directly deny the corrupt agreement, and then conclude to the country (g).

LORD MANSFIELD,—This point is settled by the case of *Baynham v. Matthews*.

WILLES, and ASHHURST, *Justices*, of the same opinion, BULLER, *Justice*,—There is a distinction which runs through all the cases. It is this: When the whole of the matter of the plea is denied in the replication, it must conclude to the country; but when a particular fact alleged in the plea is selected and denied, then the replication must conclude with an averment. Let us examine this replication by that rule. This plea consists of two distinct

(a) C. B. E. 42 El. Cro. El. 754.

(b) B. R. M. 22 Car. 2. 1 Mod. 72.

(c) B. R. T. 4 Geo. 2. 2 Str. 871.

(d) H. 19 Geo. 3. *supra*, 94.

(e) B. R. E. 30 Geo. 2. 1 Bur. 317.

(f) 1 Burr. 320.

(g) 1 Burr. 321.

distinct allegations: 1. That there was a corrupt agreement: 2. That the bill was given in consideration of that corrupt agreement. The replication denies only one of those facts, *viz.* That there was such a corrupt agreement. Therefore, according to the rule, the conclusion here was proper. If the point were new, much might be said on the other side, but the principle is settled; and the case of *Baynham v. Matthews* is directly in point, and has been confirmed by many subsequent decisions; particularly by *Clark v. Glass* (i), cited in *Robinson v. Raley*, and *Sandford v. Rogers*, in the *Common Pleas* (k). In the case of *Boyce v. Whitaker*, the whole plea was denied, *viz.* that the bond was given for *ease and favour*.

Judgment for the plaintiffs [† 100.]

- (i) B. R. T. 28 & 29 Geo. 2. 1 23 Geo. 3. *Bush v. Leake*, B. R. T.
 Burr. 319. 23 Geo. 3. & *Slater v. Carne*, B. R. H.
 (k) H. 33 Geo. 2. 2 Wils. 113. 25 Geo. 3. & *Hedges v. Sandon*, B.
 [† 100] *Vide*, as to the point in this R. E. 28 Geo. 3. 2 Term Rep. 439.
case, Mulliner v. Wilkes, B. R. E.

HODGES *against* MIDDLETON and Another. Tuesday, 6th June.

THIS was a case sent by the Court of Chancery for the opinion of this court, which stated:

That *Frances Bladen*, widow, devised as follows:—"I give to my kinswoman Mrs. *Anne Middleton*, my house and lands at *Arlborough Hatch*, and all my real estate, in the parish of *Barking*, during her life, and at her death, to her children, upon condition that she or they constantly pay 50*l.* a year for a clergyman to officiate in my chapel, &c. and on failure of these conditions here mentioned, then I give the said house and lands to my own next heirs, to be enjoyed on the same conditions; and, in case of failure of children of my said kinswoman Mrs. *Anne Middleton*, then I give the house and lands aforesaid to her brother Mr. *George Hodges*, and his children, on the same conditions; and, in case of failure of his children, then I give the said house and lands to the sisters or sister of the said *Anne Middleton* and *George Hodges*, to be equally divided between them, or their children that are living at that time."—That the testatrix died, leaving the said *George Hodges* her heir at law; that *Anne Middleton* entered upon the premises, and enjoyed them till her death; that she had issue living at the death of the testatrix seven children, two by a former husband, the rest by her then husband *John Lambert Middleton*; that, in 1749, *John Lambert Middleton* and *Anne* his wife, suffered a recovery, to the use of themselves for life, and to the children of *Anne Middleton*, in such manner

A devise of all the testator's real estate in A. to B. during life, and at B's death to the children of B. with remainder over, gives either an estate-tail to B. or an estate for life to B. remainder in tail to the children of B.

1780.

SMITH
against
DOVERS.

[431]

1780.

HODGES
against
MIDDLE-
TON.

*[432]

as they jointly, or the survivor of them, should appoint; and, in default of such appointment, to the children of *Anne Middleton*, by *John Lambert Middleton*, except the eldest, and the heirs of the *several bodies of the said children, share and share alike; that, in 1761, *Anne Middleton* died, and, in 1768, her husband, then Sir *John Lambert Middleton*, died, without having made any appointment; that *Annie Middleton* had issue living at her death six children, (one of them by her first husband,) who entered on the premises on the death of Sir *John Lambert Middleton*, one of them being the eldest son excepted in the declaration of the uses of the recovery; that, in 1770, the six children suffered a recovery, to the use of themselves in fee, and that three of them were since dead; that the bill was brought by *Joseph Hodges*, son and heir at law of *George Hodges*, to have his right to the freehold and inheritance of the said premises, subject to the life estates of the surviving children, declared, and for an injunction against waste.

Upon the above devise, and facts, the order of the Lord Chancellor (a) directed, that the question should be, “What estate *Anne Middleton* took, and whether the children of the said *Anne Middleton* took any, and what estate in the premises, in question, under the will of *Frances Bladen*, the testatrix in the pleadings of the said cause named?”

HILL, Serjeant, for the plaintiff, contended, that *Anne Middleton* only took an estate for life, and that her children (being *in esse* at the death of the testatrix, which happened only a year after the date of the will, and, therefore, probably *in esse* also at the date of the will,) took an estate for life by purchase in joint tenancy. The words, “all my real estate in the parish of *Barking*,” were descriptive only of the local situation, not of the quantity of interest meant to be devised. It is laid down by Lord *Coke*, in his *Commentary upon Littleton*, that if *B.* have divers sons and daughters, and *A.* give lands to *B.* and *liberis suis*, the father and all the children take jointly (b). So in *Cook v. Cook* (c), it is said, “That if there is a devise to *J. S.* and his children, if he hath children, they take with their father; but if he hath no child, it is an estate-tail.” And in *Wild’s Case*, (d), this distinction is made, and it was there solemnly determined, after argument before all the judges, that land being devised to *A.* and his wife, and after their decease to their children, they then having issue a son and a daughter, *A.* and his wife had but an estate for life, with remainder

(a) Dated 11th February 1780.

(b) *Co. Litt.* 9. a.(c) *Canc. E.* 1706. 2 *Vern.* 545.(d) *B.R.H.* 41 *Eliz.* 6 *Co.* 16. b. S. C.

Moore 397. under the name of *Richard v. Yardley*. *Popham* and *Gawdy* thought it an estate-tail. *Moore*, loc. cit.

remainder to their children for life. *Goodwin v. Goodwin* (c), is another case to the same purpose.

1780.

HODGES
against
MIDDLE-
TON.

Wilson, for the defendants,—1. If *Anne Middleton* took an estate-tail under the devise to her and her children; or, 2. If the children took a remainder in fee as purchasers, the plaintiff must fail in his claim. 1. It is admitted, that there are cases where the word “*children*,” in a will, is a word of limitation, and creates an estate-tail (a); and Lord *Hale*, in delivering his opinion in *King v. Melling* (b) [†], seems to think it may be *nomen collectivum*, although there be children then *in esse*. There is a case in 1 *Andersf.* 43. (H. 6 Eliz.) where the devise was to *A.* for the term of his life, and, after his decease, to the *men children* of his body; and it was held, that *A.* took an estate-tail. This seems to be the same case which is cited both in *Moore’s* and Lord *Coke’s* report of *Wild’s Case*, from *Bendloe’s Reports*, 4 *Eliz.* *Moore’s* state of it is nearly the same with *Anderson’s*. Lord *Coke* does not mention that the words “*for life*” were used, which certainly make the decision stronger; and he must be incorrect in saying, that it was determined to be an estate-tail, because it did not appear in the case, that there were issue-male at the time of the devise; neither of the two other reporters mention that circumstance; and, if the determination had proceeded upon such a distinction, the fact would certainly have been enquired into, and ascertained. The words “*in case of failure of*” “*children*,” in the present will, show, that the *testatrix* had “*issue in general*” in contemplation, which *might or might not* fail; for these words would have been absurd if she had meant only persons then existing, or descendants in the first degree, because they *must* fail. In a late case of *Cookson, Lessee of Rous, v. Rous* (c), your Lordship, in delivering the opinion of the court, said, that, from the words “*in case*” being used, the court must hold, that the testator had some *contingency* in contemplation. From the conditions imposed by the devise, it must be inferred, that the word “*children*” was meant as expressive of the interest devised to *Anne Middleton*; for if it had been the intention of the testatrix to give estates by purchase to her children,

(c) *Canc.* 3 July, 1746. 3 *Atk.* 370. But the point of construction was not determined in that case.

(a) *Vide* H. 20 G. 3. *Davie v. Stevens*, *supra*, p. 321.

(b) B. R. M. 24 Car. 2. 1 *Ventr.* 225. 231.

[†] “It is a great misfortune there is no report of that case (*King v. Melling*), by Lord *Hale* himself, or of his own argument, for though the cases

there cited are often mentioned by judges, yet there is no certainty of the correctness of the report.” *Id.* per. *Hardw. Lethieullier v. Tracey, Canc.* 1754. *Ambl.* 220. 223. and in S. C. 3 *Atk.* 796: his Lordship says, “This case of *King v. Melling*, is very imperfect in *Ventr.*, especially as to the cases said to have been cited by *Hale*,”

(c) B. R. M. 17 Geo. 3.

1780.

HODGES
against
MIDDLE-
TON,

children, it is hardly possible that she should have made the non-performance of the conditions *by the mother*, operate without any fault of theirs, as a forfeiture of their interest.

2. If *Anne Middleton* took only for life, I contend, that the children took an estate in fee. It cannot be denied, that "all my real estate" are words which in general in a will would carry the fee-simple. But it is said, 1. That the additional expression of "in the parish of *Barking*," makes the preceding words operate as descriptive of the local situation, and not of the quantity of interest meant to be devised. In answer to this, it is to be observed, that, in none of the cases where the word "in" has been used, has "all my estate" been held to be only descriptive of situation, although, where "at" has been the word, that construction has sometimes been adopted. Indeed in the case of *Ibbetson v. Beckwith* (a), Lord *Talbot* denied this distinction, and decided, that, although the words there were "all my estate at N." a fee-simple passed; and *Wilson v. Robinson*, there cited, is to the same purpose (b). 2. It is said, that, if the words here used are descriptive of the place, not of the interest, *with regard to the first limitation*, which must be admitted on the present supposition, viz. that *Anne Middleton* only took an estate for life, they must operate in the same manner *with regard to the subsequent limitation* to the children. To this objection, the case just cited, of *Ibbetson v. Beckwith*, furnishes a complete answer; for, there, the devise was of "all my estate at N. to my mother for her natural life, and to my nephew *Thomas*, after her death;" and it was held, that the mother took an estate for life, and *Thomas* a remainder in fee.

Hill, Serjeant, in reply, said, he admitted that the words "in case" shewed that some contingency was in contemplation; but it was the contingency of there being no issue alive at the death of *Anne Middleton*.

The court did not deliver any opinion on this case from the bench.

The certificate was in the following words:

"We are inclined to think, that, under the will of *Frances Bladen*, the testatrix, *Anne Middleton*, took an estate-tail; but, if she took an estate for life only, we are of opinion, that her children would take an estate-tail; and, in either case, the limitation to *George Hodger*, the heir at law, was barred by recovery, and the plaintiff has no title.

MANSFIELD,
E. WILLES,
W. H. ASHHURST,
F. BULLER."

14th June, 1780.

[435]

(a) *Canc. M.* 1733. *Ca. Temp. Talb.* 157. (b) *B. R. M.* 25 *Car.* 2. 2 *Leo.* 91.

1780.

IN the night between *Tuesday* the 6th, and *Wednesday* the 7th of *June*, Lord MANSFIELD's house in *Bloomsbury-square*, was attacked by a party of the rioters, who, on the *Friday* and *Tuesday*, to the amount of many thousands, had surrounded the avenues to the two Houses of Parliament, under pretence of attending Lord *George Gordon*, when he presented the petition from the Protestant Association [1]. On the *Tuesday* evening the prison of *Newgate* had been thrown open, all the combustible part reduced to ashes, and the felons let loose upon the public. It was after this attempt to destroy the means of securing the victims of criminal justice, that the rioters assaulted the residence of the chief magistrate of the first criminal court in the kingdom; nor were they dispersed till they had burnt all the furniture, pictures, books, manuscripts, deeds, and, in short, every thing which fire could consume in his Lordship's house [2]; so that nothing remained but the walls; which were seen the next morning almost red hot, from the violence of the flames, presenting a melancholy and awful ruin to the eyes of the passengers.

On *Wednesday*, the devastation became almost general throughout *London*. The houses of many of the most respectable

[436]

[1] Lord MANSFIELD acted at that time as Speaker of the House of Lords, in the absence of the Lord Chancellor, who was ill.

[2] The amount of that part of Lord MANSFIELD's loss which might have been estimated, and was capable of a compensation in money, is known to have been very great. This he had a right to recover against the *Hundred* (a). Many others have taken that course (b); but his Lordship thought it more consistent with the dignity of his character, not to resort to the indemnification provided by the legislature. His sentiments on the subject of a reparation from the state were communicated to the Board of Works, in a letter (c) written in consequence of an application which they had made to him, (as one of the principal sufferers,) pursuant to directions from the Treasury (d), founded on a vote of the House of Commons (e), requesting him to state the nature and amount of his loss. In

that letter, after some introductory expressions of civility to the Surveyor General, to whom it was addressed, his Lordship says, "Besides what is irreparable, my pecuniary loss is great. I apprehended no danger, and therefore took no precaution. But how great soever that loss may be, I think it does not become me to claim or expect reparation from the state. I have made up my mind to my misfortune as I ought: with this consolation, that it came from those whose object manifestly was general confusion and destruction at home, in addition to a dangerous and complicated war abroad. If I should lay before you any account or computation of the pecuniary damage I have sustained, it might seem a claim or expectation of being indemnified. Therefore you will have no further trouble upon this subject from, &c.,

"MANSFIELD."

(a) Under 1 Geo. 1. st. 2. c. 5. § 6.

(b) *Vide infra*, p. 699.

(c) Dated *Cane-wood*, 12 August 1780.

(d) Dated 18 July 1780.

(e) 6 July 1780.

1780.

respectable individuals had been previously attacked: That evening, the *Fleet* and *King's Bench* prisons were set on fire; the Bank of *England*, the Inns of Court, almost all the public buildings, were threatened with destruction: and an universal conflagration must have taken place, if the King had not issued a proclamation for the speedy and effectual interposition of the military power. Till then, the soldiery had scarcely dared to act offensively [3]; the ordinary magistrates were, for the most part, deterred or prevented by various causes, from giving their sanction to the employment of the troops; and, in many places, the men under arms, with their officers at their head, though drawn up in military order, did nothing more than preserve a space between the incendiaries and the crowd of spectators, so as to have the effect of enabling the former to demolish the houses and property of their fellow subjects without interruption [4].

The courts of justice continued, on the *Wednesday*, to sit, in order to do the business of course; but almost every where else, except in *Westminster Hall*, the rioters seemed, that day, to have obtained a complete mastery, and a real anarchy pervaded all parts of the metropolis. The execution done by the troops on the night between the *Wednesday* and *Thursday*, though very few lives were sacrificed, produced a happy revolution. The numerous bands of rioters had entirely vanished on the *Thursday* afternoon; scarce a single badge of the Protestant Association (which was a blue cockade, and which all the rioters wore,) was to be seen; and the total suppression of this insurrection, in its circumstances without example in the history of *Europe*, was as sudden as its rise: The encampment of large bodies of the army and militia in and near *London* for several months, prevented the renewal of the commotions there; and although a scene of the same sort took place a few days afterwards at *Bath*, and was commenced, or expected, in other parts of *England*, similar precautions entirely extinguished, not only all danger, but all apprehension, in the space of a few weeks.

On *Thursday*, the 8th, and *Friday*, the 9th of *June*, the Courts only sat to hear motions.

[3] A proper precaution used in ordinary cases to prevent a rash interposition, had been mistaken for a rule of law, viz. that no man ought to resist force by force, without the express direction of a civil magistrate.

[4] The mischief the rioters did, was from a persuasion, confirmed by

example, that the troops did not dare to act. *Brackley Kennet*, the Lord Mayor of *London*, was prosecuted by information, and, upon a full trial, convicted of a breach of duty, because he had not ordered the troops to quell the rioters by force.

HOLMES, Lessee of BROWN, *against* BROWN.

1780.

Saturday, 10th June.

THIS was an application for a trial at bar. *Kenyon*, some time before, had obtained a rule to shew cause, and *Partridge* this day shewed for cause, (upon affidavits,) that the lessor of the plaintiff was in such indigent circumstances, as not to be able to bear the expence, and that one of his witnesses was a woman of above 80 years of age, who might die before a trial at bar could be had. The value of the premises was stated to be about 2000*l* a year; and the question, whether a codicil to a will by which they were devised was duly executed. *Partridge* cited Lord *Sandwich's* Case in *Salkeld* (a).

The grounds for granting a trial at bar are, great value, probable length, and probable difficulties, in the trial.

—The court may lay the party applying under the terms of receiving *nisi prius* costs, and paying *bar* costs.

Kenyon, in support of the rule, said, that the grounds on which a trial at bar ought to be granted, were, the great value of the subject-matter of the litigation, the probable length of the enquiry, and the likelihood that difficulties might arise in the course of the trial [1]. He then endeavoured to shew, that these reasons co-operated in this case.

Lord MANSFIELD absent.

The court were of opinion, that this was a case where it was fit, that a trial at bar should be granted; but said, that, as it was a favour asked by the defendant, they would lay him under the terms, that, if he succeeded, he should only have *nisi prius* costs; but that, if the lessor of the plaintiff were to succeed, *he* should have bar costs; and that the old witness should be examined upon interrogatories, and her depositions read, if she should die before the trial. It was also, (by consent,) made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated.

The rule made absolute.

[438]

(a) B. R. T. 11 Will. 3. & T. 4 Ann. 2 Salk. 648.

[1] The words of the statute of *Westminster* 2. (13 Edw. 1. c. 30.) are; "Sed inquisitiones de grossis & pluribus

"articulis, quæ magna indigent examinatione, capiantur coram Justiciariis Banci." Vide *Rex v. Amery*, T. 26 Geo. 3. 1 Term Rep. 363.

MASON *against* SKURRAY.

Saturday, 10th June.

ACTION on a policy of insurance; verdict for the defendant; new trial granted; and a second verdict for the defendant. The rule for a new trial had not been drawn up "upon payment of costs," nor had the costs

Where a new trial has been granted, and nothing was said in the rule, concerning the costs of the first, although

the same party succeed on the second trial, he shall not have the costs of the first.

1780.

MASON
against
SKURRAY.

been reserved. On *Saturday*, the 27th of *May*, *Crowper* obtained a rule to shew cause why the defendant should not be allowed the costs of the first trial.

Dunning now shewed cause.

Lord MANSFIELD absent.

The court said, as nothing had been said about the costs of the first trial in the rule, and they had not been reserved to abide the event of the second verdict, the defendant was not entitled to receive them.

The rule discharged [† 101].

[† 101] *S. P. Schulbred v. Nutt, B. Smith, B. R. M.* 30 *Geo. 3.* 3 *Term R. M.* 23 *Geo. 3.* And *Hankey v. Rep.* 507.

Tuesday,
13th June.

THELLUSSON against STAPLES.

In taxing costs, the contingent losses which witnesses may have suffered by obeying the subpoena, cannot be allowed.

* [439]

IN this cause (a), two of the plaintiff's witnesses were foreigners (b), being the captain and first lieutenant of a ship, which was a *French* merchantman. They had been brought over to give evidence in the case of *Thellusson v. Fergusson* (c), had returned to *France* and were again brought over for the trial of this cause. *Upon the taxation of the plaintiff's costs, the master allowed the expences of the two witnesses in the journey and voyage going and coming, and during their stay in *England*; but the insured, for whom the plaintiff *Thellusson* was only an agent, and who was a merchant in *France*, stated to the court, in an affidavit, that the two witnesses, when they were last in *France*, had been appointed supercargoes to two *French East-India* ships, and that they had lost their voyage by their attendance on this last trial; that before they left *France*, they had made a protest against him, on account of any damages or loss they might sustain by coming to *England*; and that he believed that, on his return to *France*, he should be obliged to indemnify them. That as supercargoes they would have been entitled to five pounds sterling *per cent.* on the produce of the outward and homeward bound voyages; besides provisions, and other advantages. The master having refused to make any allowance on the above account, *Douglas* now moved for a rule to shew cause why he should not review his taxation, and make an allowance adequate to what, by computation, the insured would, according to his affidavit, be liable to pay.

Lord MANSFIELD absent.

The court refused the rule, and said, they could not allow for contingent damages; that it would be a dangerous precedent; and that the master had certified, that such applications had frequently been made, and always without success.

(a) *Supra*, p. 366. Note [9].

(b) But only one of them was examined, either on the trial of *Thellusson v.*

Fergusson, or *Thellusson v. Staples. Supra*, p. 361. 366. Note [9].

(c) *Supra*, p. 361.

1780.

The KING *against* the Inhabitants of HANWOOD.Tuesday
13th June.

JOSEPH BROWN, his wife and child, were removed, under an order of two justices, from the township of *Leeds*, in the borough of *Leeds*, to the township of *Hanwood*. Upon an appeal, the court of quarter-sessions confirmed the order, and stated a special case, as follows:

"It appeared in evidence that *Joseph Brown*, the husband, in the year 1774, being then a single man, and an inhabitant as a servant in husbandry, at *Hanwood*, wanting again to hire himself as a servant in husbandry, offered himself at the statute fair at *Hanwood* aforesaid, where there is a custom for servants to hire at the statute day, on the last *Monday* in *October*: but not meeting with a master there, he went to the market-town of *Otley*, about eight miles distant from *Hanwood*, where there is a different custom, for servants to hire by the year at two different statutes; one held on the *Friday* before old *Martinmas* day, the other on the *Friday* next after old *Martinmas* day; at which latter statute fair they always hire till the old *Martinmas* day following, which, by the custom, is considered as a hiring for a year. Old *Martinmas* day, in 1775, was on a *Tuesday*. On the *Friday* following, being the second statute fair above mentioned, the pauper hired with one *Pike*, to serve his mother, *Anne Frith* in *Hanwood*, till the old *Martinmas* day following, and did accordingly serve her in *Hanwood*, till the old *Martinmas* day following."

Dunning shewed cause, and relied on the case of *Rex v. Newstock* (a), where a hiring at a statute fair, held on the day next after old *Michaelmas* day, to serve till the old *Michaelmas* day following, such sort of hiring being stated to be according to the custom and usage of the country, was held to be sufficient. The principle in that case, he said, was not new. It was settled by a prior decision, in *Rex v. Newstead* (b), where the hiring was to serve for a year from *Whitsuntide* to *Whitsuntide*; and the court held that to be a good hiring, although the space of time was, in truth, less than 365 days, the case having stated that such hiring was usual in that country, and was always considered as a hiring for a year by the contracting parties. He contended, that the customary year at *Otley* ought to govern this case as the contract was made at that

When a hiring, upon the face of it, appears to be for less than 365 days, no usage, to consider the time specified in the hiring as a year, will make such hiring sufficient for the purpose of a settlement.

[440]

(a) *M. 13 Geo. 3. Burr. Settl. Ca.*
No. 222.

(b) *T. 10 Geo. 3. Ibid. No. 208.*

1780.

The KING
against
HANWOOD.

that place, although the service was performed at *Hanwood*.

Fearnly argued on the other side.—He cited the cases of *Pepper-harrow v. Trensam* (a), *Coombe v. Westwoodhay* (b), *Rex v. Westwell* (c), *South Cerney v. Coultsbourn* (d), and *Rex v. Newton* (e), as having completely established, that no hiring, which on the face of the contract appears to be for a less time than a year, is sufficient for gaining a settlement. In *Rex v. Newstead* that was not the case, *Whitsuntide* being a moveable feast, there was not necessarily less than a year in the interval between *Whitsuntide* and *Whitsuntide*. In *Rex v. Navestock*, the hiring was for a full year, if, under the words “till the Michaelmas day following,” that day was included [1]; and Lord MANSFIELD expressly said, in that case, that there must be a hiring for a year.

[441]

Lord MANSFIELD absent.

WILLES, *Justice*,—The only question is, Whether a hiring for three days less than a year, can be construed a hiring within the meaning of the statute? The cases cited by Mr. *Fearnly* all shew the contrary. In the case of *Rex v. Newstead*, the duration was uncertain, and the hiring was supported by the custom of the country. In *Rex v. Navestock*, as there is no fraction of a day, and the word “till” might be construed to include the Michaelmas day, the hiring was considered as for a complete year; and the court there recognized the general doctrine contended for by Mr. *Fearnly*. The custom here, (if it could be of any weight to controul an act of parliament,) is stated to be the custom of Otley, and the contract was performed in another place. I think the orders must be quashed.

ASHHURST, *Justice*, of the same opinion.

BULLER, *Justice*,—There is no case where the time appeared manifestly to have been less than a year, in which the court has held that a settlement was gained; and it would be dangerous to make a new precedent of that sort.

Both the orders quashed.

(a) M. 1 Geo. 1. 3 *Burn's Just.* 13th Edit. 375.

(b) H. 5 Geo. 1. 1 *Str.* 143.

(c) T. 3 Geo. 2. 3 *Burn's Just.* 375.

(d) *Ibid.* 375, 376.

(e) M. 14 Geo. 2. *Burr. Settl. Ca.* No. 551.

[1] In that case the court laid some

stress on the custom of the country, (*Burr. Settl. Ca.* p. 722.); but, in a late case of *Rex v. Syderstone*, (E. 17 Geo. 3.) a hiring on the 11th of October 1771, till old Michaelmas day 1772, was held to be a sufficient hiring, though there was nothing stated of any custom or usage [† 102].

[† 102] S. P. *Rex v. Savalcliff*; H. 27 Geo. 3. 1 *Term Rep.* 490.
23 Geo. 3. *Rex v. Skiplam*, M.

The KING *against* SMITH and Others.

1780.

Tuesday,
13th June.

THIS was an indictment against the defendants, for obstructing the mayor and commonalty of the city of London, in making a horse-towing path on the soil of the river *Thames*, under powers vested in them by the statutes of 14 Geo. 3. c. 91. and 17 Geo. 3. c. 18. The *first* count recited the act, and charged, that a horse-towing path was begun to be made from *Water-Lane* at *Richmond* bridge and certain wooden piles fixed, by order of the common council, on the soil and bed of the river, between high-water mark and low-water mark, and that the defendants, intending to obstruct the mayor, &c. cut down one of the said piles, &c. The *second* count laid the piles to have been driven upon the soil and bed of the river, being the King's ancient common high-way for all the liege subjects to navigate. The *third* count laid the towing-path to have been between the city of London and the city-stone at *Staines* bridge, between high-water mark and low-water mark. The *fourth* count stated, that a towing-path was begun, &c. by the committee, (naming them,) appointed by the common council to execute the act, on the soil, &c. being the King's ancient and common high-way, between high-water mark and low-water mark, &c. The *fifth* count set forth, that a towing path had been begun by order of the common council, &c. (but without mentioning the act of parliament. The *sixth* and last count resembled the *fifth*, only stating, that the towing path had been begun by order of the committee. The trial came on before ASHHURST, Justice, at the last Lent assizes for the county of *Surry*, when a verdict was found for the King, subject to the opinion of the court on the following case:

"The city of London, under the powers supposed to be delegated to them under the act of parliament of 14 Geo. 3. c. 91. and by the 17th of the same King, intituled, &c. (c. 18.) erected piles on the bed of the river, near *Richmond*, within the high-water mark, about the distance of 29 feet from the shore, for the purpose of making a towing path for horses, adjoining and contiguous to a wharf in the possession, and the property of the defendants, or of those under whom they claim. The defendants cut down one of those piles, which is the subject of the present indictment, and which was proved to have been erected between the high and low-water mark, opposite to the said wharf. No acts of ownership were proved, on either side, in the spot in question; but it

was

The right to the soil of a navigable river, is not, by presumption of law, in the owners of the adjoining lands.—It is an offence at common law, to obstruct the execution of powers granted by statute, and an indictment for such offence need not, and ought not, to conclude "contra formam statuti."

* [442]

1786.
The KING
against
SMITH.

[443]

was proved, that the *Isle* (a) in the middle of the river was Mr. Price's (b). It was proved, that, immemorially, at the time of low water, persons used to pass on foot between the high and low-water mark, for the purpose of towing barges and other vessels.

"The question submitted to the court is, "Whether (this being a navigable river,) the right to the soil in the bed of the river, *usque ad filum aquæ*, is in the owners of the ground adjoining to the river?"

The case was argued, last term, on *Wednesday*, the 3d of May, by *Erskine* for the prosecution, and *B. Hunter* for the defendants.

Erskine contended, that the only question brought before the court was, Whether the soil of the spot in question was, or was not the property of the defendants, or of those under whom they claimed? Its being the property of third persons would not be a justification on this indictment; for the defendants were not entitled by law to abate the piles driven on another person's ground, for a consequential injury to theirs. The defendants, therefore, must shew that the soil was theirs; and as they gave no proof of any actual exercise of ownership, it was incumbent upon them to maintain it was theirs by inference of law, because the property in the adjoining ground belonged to them.

Hunter insisted, 1. That the statutes did not mean to vest in the city the power of making towing paths by *embankment*. 2. That the soil belonged to the defendants, and they were therefore protected by the 16th section of the statute, by which it is provided, "That the powers granted to the city should not extend to authorize them to make any *new* towing path, over, upon, or through, any garden, orchard, yard, park, paddock, inclosed lawn, or planted avenue, to any house, without the consent of the owner thereof." 3. That supposing it uncertain to whom the soil belongs, the city had not complied with the terms prescribed by the statutes to entitle them to make a horse-towing path.—1. On the first point, he said, that there was no express power given to make *embankments*, and the court would not raise a power, liable to great inconvenience and abuse, by implication. If such embankments could be made at the pleasure of the city, they would tend to diminish the value of the adjoining lands, and might alter the course of the river, besides exposing the villas and private property of individuals to the disorders and trespasses which bargemen might commit in passing through them.—2. On the second head, he said, that, if the soil was in the defendants, the case was clearly within the provision of the 16th section

(a) A small island.

(b) Price was the owner of the wharf,

section of 14 Geo. 3. cap. 91; for though *wharfs* are not expressly mentioned, they might be fairly construed to be comprehended under the word "*yard*." That this was a new towing path was clear, because the case only stated, that * persons formerly used to pass on foot at the time of low water; but this would make a passage at all times.

As to the property, the legal presumption was certainly in favour of the defendants, and there being no evidence on either side, the presumption ought to prevail. The soil must have some owner; the city had no claim to it; they did not pretend any right of ownership at the trial; and, as to the right of the crown, a distinction was to be made: that right was only in navigable rivers, as far as the sea ebbs and flows. It did not depend alone on the circumstance of the river being navigable. Some rivers were so immemorially, by nature, and from the flux and reflux of the sea; others were kept in a navigable state by the effects of art. The *Thames* might be considered as falling under the first description up to *London bridge*. From thence upwards, it was preserved in a navigable state by art. The authorities concerning the right of the crown to the soil extended only to navigable rivers of the first sort. The sea did not properly flow above *London bridge*. The tide, beyond that limit, was occasioned by the pressure and accumulation backwards of the river water. Therefore the soil there did not belong to the crown. This distinction seemed to be adopted in several cases; 1 Mod. 105. *Anon*; 2 Roll. Abr. 170. pl. 14, 15; *Davies's Rep.* 55. 57.; *Carter v. Murcot* (a). He also stated the pleadings in a case of *Chesbyre v. Dunball*, where the same idea was adopted, and which had been settled on great consideration, by Sir *Joseph Yates* and *Wynne*, afterwards Baron of the Exchequer in *Scotland* (b).

Lord MANSFIELD told *Erskine*, it was unnecessary for him to reply. His Lordship said, the distinction between rivers navigable, and not navigable, and those where the sea does or does not ebb and flow, was very ancient; but that what *Hunter* contended for, viz. a distinction between the case of the tide occasioned by the flux of sea water, or by the pressure backwards of the fresh water of a river, seemed to be entirely new, and that there were no facts set forth in the case which let in the consideration of that distinction. That the case did not state, whether the water, when the tide rises at *Richmond*, is fresh or salt, but that it rather took it for granted that it is salt, describing the *Thames* generally as a navigable river. That as to the first and third objections, there was no question made by the case, on the authority of the city to

1780.

The King
against
SMITH.

* [444]

(a) B. R. H. 8. Geo. 3. 4 Burr.

(b) Those pleadings were furnished
him by the Solicitor General.

1780.

The KING
against
SMITH.

to embark, or whether they had pursued the directions prescribed by the Legislature.

The verdict of *guilty* was ordered to be entered.

Afterwards, in this term, on *Monday*, the 5th of *June*, *Rous* having moved for judgment against the defendants, *Peckham* obtained a rule to shew cause, why the judgment should not be arrested. He applied for this rule on three grounds, 1. That the offence, (if at all indictable,) was for obstructing the execution of the statute, and, therefore, the indictment ought to have concluded, (which it did not,) that the defendants had acted "against the form of the statute." 2. That the prosecutors ought to have stated, that they had purchased the soil, according to the provision for that purpose in the statute. 3. That, as there are a great variety of powers given by the act, and adapted to a multiplicity of different cases, the indictment was too general and uncertain, not setting forth under what particular clause or power the city had acted.

On his first point, he cited *Hawkins's Pleas of the Crown*, B. 2. c. 25. § 116. where it is laid down, "That if an indictment do not conclude *contra formam statuti*, and the offence indicted be *only* prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it (a)." But *ASHHURST, Justice*, observing, that it was an offence at common law to obstruct the execution of an act of parliament, this objection was abandoned.

This day, cause was shewn, by *Dunning, Davenport, Sylvester, Rous, Rose and Erskine*.—They insisted, that the directions in the act for purchasing the soil, only related to the case of private owners. If the soil belonged to the crown, the act itself contained the king's consent, and if to the city, (which they said was most probable,) it would be absurd to apply the provisions for purchasing to such a case. But if the case had even stated the property to belong to some private owner, but to none of the defendants, it would not be competent to *them* to question what had been done. Let the owner complain of the supposed injury, which he might in an action or indictment for the trespass. He might not think it an injury, but a benefit. As to the method pursued by the city, in the execution of the statute, and the particular clauses under which they had acted, their authority was sufficiently shewn in the indictment, which set forth the statute; and none but the actual owners of the ground where they had made the path could question what they had done.

Peckham, Mingay, and B. Hunter, for the defendants.

LORD MANSFIELD absent.

WILLES, Justice,—Only two of the powers in the act, which are various, are necessary to be observed upon here.

(a) P. 251.

viz. the power to improve the navigation, and the power to compel a purchase. Now, if *they* are considered together, it will appear, that the improvements are to be carried on without purchasing, where there is no occasion to purchase, and nothing is stated here to shew, that this was a case where purchase was necessary. The indictment sets forth, that the prosecutors were interrupted in the due execution of the act, and that is found by the verdict. I see no foundation for arresting the judgment.

ASHHURST, *Justice*, of the same opinion. He said, there was no sort of doubt on the first point.

BULLER, *Justice* — As to the first point, it was very properly given up; the indictment would have been wrong, if it had concluded *contra formam statuti*. I think, on the face of the indictment, we must take the soil of the spot in question to be in the crown; for though not necessarily, yet, *prima facie*, the soil of a navigable river belongs to the King. The fact of the obstruction is sufficiently averred.

The rule discharged.

1780.

The KING
against
SMITH,

ON Wednesday, the 14th of June, being the last day of the Term, Lord MANSFIELD was in court for the first time since the riots. The reverential silence which was observed when his Lordship resumed his place on the Bench, was expressive of sentiments of condolence and respect, more affecting than the most eloquent address the occasion could have suggested. *Curae leves loquuntur; ingentes stupent.*

[447]

The End of TRINITY TERM 20 GEORGE III.

1780.

The KING
against
SMITH.

to embark, or whether they had pursued the direction prescribed by the Legislature.

The verdict of *guilty* was ordered to be entered.

Afterwards, in this term, on *Monday*, the 5th of *June*, *Rous* having moved for judgment against the defendants, *Peckham* obtained a rule to shew cause, why the judgment should not be arrested. He applied for this rule on three grounds, 1. That the offence, (if at all indictable,) was for obstructing the execution of the statute, and, therefore, the indictment ought to have concluded, (which it did not,) that the defendants had acted "*against the form of the statute.*" 2. That the prosecutors ought to have stated, that they had purchased the soil, according to the provision for that purpose in the statute. 3. That, as there are a great variety of powers given by the act, and adapted to a multiplicity of different cases, the indictment was too general and uncertain, not setting forth under what particular clause or power the city had acted.

On his first point, he cited *Hawkins's Pleas of the Crown*, B. 2. c. 25. § 116. where it is laid down, "That if an indictment do not conclude *contra formam statuti*, and the offence indicted be *only* prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it (a)." But *ASHHURST*, *Justice*, observing, that it was an offence at common law to obstruct the execution of an act of parliament, this objection was abandoned.

This day, cause was shewn, by *Dunning*, *Davenport*, *Sylvester*, *Rous*, *Rose* and *Erskine*.—They insisted, that the directions in the act for *purchasing* the soil, only related to the case of private owners. If the soil belonged to the crown, the act itself contained the king's consent, and if to the city, (which they said was most probable,) it would be absurd to apply the provisions for purchasing to such a case. But if the case had even stated the property to belong to some private owner, but to none of the defendants, it would not be competent to *them* to question what had been done. Let the owner complain of the supposed injury, which he might in an action or indictment for the trespass. He might not think it an injury, but a benefit. As to the method pursued by the city, in the execution of the statute, and the particular clauses under which they had acted, their authority was sufficiently shewn in the indictment, which set forth the statute; and none but the actual owners of the ground where they had made the path could question what they had done.

Peckham, *Mingay*, and *B. Hunter*, for the defendants.

LORD MANSFIELD absent.

WILLES, *Justice*,—Only two of the powers in the act, which are various, are necessary to be observed upon here.

viz. the power to improve the navigation, and the power to compel a purchase. Now, if *they* are considered together, it will appear, that the improvements are to be carried on without purchasing, where there is no occasion to purchase, and nothing is stated here to shew, that this was a case where purchase was necessary. The indictment sets forth, that the prosecutors were interrupted in the due execution of the act, and that is found by the verdict. I see no foundation for arresting the judgment.

ASHHURST, *Justice*, of the same opinion. He said, there was no sort of doubt on the first point.

BULLER, *Justice* — As to the first point, it was very properly given up; the indictment would have been wrong, if it had concluded *contra formam statuti*. I think, on the face of the indictment, we must take the soil of the spot in question to be in the crown; for though not necessarily, yet, *prima facie*, the soil of a navigable river belongs to the King. The fact of the obstruction is sufficiently averred.

The rule discharged.

1780.

The KING
against
SMITH.

ON Wednesday, the 14th of June, being the last day of the Term, Lord MANSFIELD was in court for the first time since the riots. The reverential silence which was observed when his Lordship resumed his place on the Bench, was expressive of sentiments of condolence and respect, more affecting than the most eloquent address the occasion could have suggested. *Cura leves loquuntur; ingentes stupent.*

[447]

The End of TRINITY TERM 20 GEORGE III.

C A S E S
ARGUED and DETERMINED
IN THE
Court of KING's BENCH,
IN
Michaelmas Term,

1780.

In the Twenty-first Year of the Reign of GEORGE III.

Monday,
6th Nov.

HEAWARD against HOPKINS.

If there is a plea of *tender* as to part and *non assumpsit* as to the residue, and, the plea of *tender* being found for the defendant, the balance proved on the *non assumpsit* is under 40 s. yet, if that added to the sum tendered exceed 40 s. the defendant, though subject to the jurisdiction of the county court of *Middlesex*, is not intitled to double costs under 23 Geo. 2. c. 33. § 19.

* [449]

ACTION of *assumpsit* on a tradesman's bill; plea of *tender* as to 2l. 18s. 4d. part of the demand; and *non assumpsit* as to the rest. The plaintiff having proceeded to trial, there was a verdict for the defendant on the *tender*, and for the plaintiff on the *non assumpsit*, but with damages under 40s. viz. 7s. 6d. The defendant, upon an affidavit, stating that he resided in the county of *Middlesex*, obtained a rule to shew cause why he should not be at liberty to suggest on the roll that the damages were under 40s. in order to intitle himself to the benefit of the statute of 23 Geo. 2. c. 33. § 19.

Cause was this day shewn against the rule, by the Attorney General (*Wallace*,) and *Runnington*. They cited the case of *Pitts v. Carpenter* (a), where there was a plea of set-off, and, the plaintiff having proved that there was above 40s. due to him, although the defendant by the set-off reduced the balance to 1l. 1s. 3d. and the verdict was only for that sum, the court refused a suggestion like that now applied for, because they considered the act as meant to restrain parties within the jurisdiction *of the inferior court from suing in *Westminster Hall*, only in cases where the just demand, at the time of the action brought, appears by the verdict not to have amounted to 40s. Now, as in that case it was in the defendant's power not to have pleaded a set-off, in which event the damages must have exceeded

(a) B. R. T. 16 & 17 Geo. 3. 1 Wils. 525.

exceeded that sum, so here, they said, the plaintiff could not foresee that a tender would be pleaded; and, if it had not been pleaded, the damages would have amounted to 3*l.* 5*s.* 10*d.*

Dunning, and Baldwin, in support of the rule, insisted, that the defendant ought to have taken the 2*l.* 18*s.* 4*d.* when tendered, and then have brought his action only for the balance.

Lord MANSFIELD, — The plaintiff could not know that the defendant would plead a tender. The reason of the determination in the case of *Pitts v. Carpenter*, is equally applicable here. The tender was not an extinguishment of the debt, and the question is, what appears to have been due at the time of the action brought, for if that exceeded 40*s.* the inferior court has no jurisdiction.

The rule discharged (c).

(c) *Vide* *Wooley v. Cloutman*, M. 20 v. *Burrows*, M. 20 Geo. 3. *supra*, p. Geo. 3. *supra*, p. 244. *Wase v. Wyburd*, 263. and *Wiltshire v. Lloyd*, E. 20 M. 20 Geo. 3. *supra*, p. 246. *Ailway* Geo 3. *supra*, p. 381.

KIRK against STRICKLAND.

Wednesday
8th Nov.

MOTION, by *Chambre*, for a rule to shew cause, why the defendant should not be discharged, upon filing common bail. The action was debt, upon a bond, conditioned for the indemnification of a parish against a bastard child. The penalty in the bond was 50*l.* and the plaintiff, in his *affidavit* for holding the defendant to bail, had sworn that he was justly indebted to him in that sum; but the defendant, in the *affidavit* on which this motion was grounded, swore that only 3*l.* and some odd shillings were really due.

To debt upon a bond conditioned for an indemnification, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred.

The court said the conduct of the plaintiff was altogether unjustifiable, and that he was liable to an action. That, in the case of a bond conditioned for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but, in other cases, the bail could only be taken for the sum to which the plaintiff would be intitled in damages for the breach of the condition. At first, however, they seemed to think they could not relieve the defendant upon this summary application, it having been an uniform rule not to go into the merits, upon such a motion, but to take the matter as it stood upon the *affidavit* to hold to bail; but, at last, they granted the rule, declaring that they were persuaded the plaintiff would not venture to shew cause against it.

[450]

1780.

Wednesday,
8th Nov.
Government
having con-
tracted to fur-
nish forage for
a certain num-
ber of horses
to be kept by
a sutler, and
the contractor
for forage
having agreed
not to com-
mute the fo-
rage for mo-
ney, an agree-
ment between
the sutler and
the contractor,
that the latter
shall allow the
former a sum
of money for
each ration of
forage allow-
ed for the
whole number
of horses and
shall retain the
forage, is
void.

WILLIS and Another against BALDWIN.

THIS was an action of *assumpsit* upon an agreement be-
tween the plaintiffs and the defendant, which was
stated, in the first count of the declaration, to the follow-
ing effect: The plaintiffs being sutlers to four regiments of
militia encamped at *Coxheath*, and as such intitled to cer-
tain forage of oats and hay for divers horses daily, out of
the King's magazine of oats and hay belonging to the
camp, and which was furnished and supplied by the de-
fendant, it was agreed between the plaintiffs and the de-
fendant, that the plaintiffs might abstain from taking the
forage, or such part thereof as they should think fit, and
might leave the same to be the property of the defendant,
and that he should pay and allow them 9½d. by the ra-
tion, for every ration to which they should be intitled,
and which they should so leave at the magazine for the
defendant. The declaration then proceeded to alledge,
that, in consequence of this agreement, the plaintiffs had
left a large quantity of forage at the magazine, which they
were entitled to as sutlers to the four regiments, to be the
defendant's property, and became, thereby, entitled to re-
ceive a sum of money from him in the stipulated propor-
tion of 9½d. per ration, which he had refused to pay.—
To this special count, were added the general counts, for
goods sold and delivered, &c.

The cause was tried, before BULLER, *Justice*, at the
Sittings for *Middlesex*, in last *Trinity Term*; and it ap-
peared, in evidence, that the plaintiffs had contracted to
keep 32 horses, 8 for each regiment, for a limited time;
during which they were to be allowed, for each horse, a
ration a day, consisting of 18lb. of hay, and 8lb. of oats:
that the defendant was a contractor with government,
and, by his contract, was bound not to commute the allow-
ance of forage for money, and that, in truth, the plaintiffs
had only kept 14 or 15 horses, instead of 32. A verdict
was found for the plaintiffs, but with leave to move to set
it aside, and enter a nonsuit.

A rule was afterwards moved for, and granted, in *Trinity*
Term, to shew cause, why a nonsuit should not be entered,
or why, if that part of the rule should, upon shewing
cause, be discharged, the defendant should not be at li-
berty to move in arrest of judgment.—The ground for
arresting the judgment was, that the agreement was ille-
gal and void, on the face of it, as stated in the declara-
tion, tending manifestly to enable the parties to defraud
the public, and divide the profit arising from the value of
forage for horses never kept by the plaintiffs.—But, if
there

there was not sufficient on the declaration to shew the illegality of the agreement, it was contended, that such illegality was clearly established by the evidence.

The *Attorney General*, and *Cowper*, now shewed cause.— They said, that, to make the agreement void, it must appear to be a certain consequence, that the public must be prejudiced by it, which was not the case; for it neither followed, that, if money was received instead of the rations of forage, the plaintiffs would not keep the stipulated number of horses, and provide forage elsewhere, nor, if the full quantity of forage was delivered over by the defendant, that the plaintiffs would employ it to feed the number of horses they were bound to keep.

Dumming, and *Baldwin*, were to have argued on the other side, but were stopped by Lord MANSFIELD.

Lord MANSFIELD,—No power of words can so bend this case as to make it appear otherwise than as a foul agreement between the parties. The question is not, whether the plaintiffs may not find out a method of cheating government although they should take the forage, but whether what they have done is not a method of cheating government. The plaintiffs are bound to keep eight horses for each of the four regiments, and, in case of them, government is to feed the horses, supplying a certain quantity, by the day, for each horse that shall be kept. By this agreement, the plaintiffs are to have a composition for the forage for the whole number of horses whether they are kept or not, which is a clear fraud upon the public.—As to the question whether a nonsuit shall be entered, or the judgment arrested, the case is much stronger against the plaintiffs upon the evidence, than as stated in the declaration.

The rule made absolute for a nonsuit to be entered.

1780.

WILLIS
against
BALDWIN.

[452]

BARNFATHER and Another, Executors of
MOFFAT, against JORDAN and Another.

Friday,
10th Nov.

THE plaintiffs, as executors of an assignee of the lessor of certain premises, brought this action of covenant for rent in arrear, against the defendants JORDAN and LEFEVRE, as assignees of the original lessee. The defendant *Lefevre* pleaded, That, before the rent in question became due, he assigned his interest to *Jordan*; which the plaintiffs admitted on the record. *Jordan* pleaded, That, before the rent became due, *Lefevre* assigned his interest to him, and that he assigned to one *Catharine Kingston*.
Replication, That at the time of the assignment to *Catharine Kingston*

In covenant
for rent
against an
assignee, an
assignment to
a *same covert*
before the
rent accrued,
is a good plea
in bar.

1780.

BARNFATHER
against
JORDAN.

Kingston she was covert of one *Thomas Kingston* her husband, who was still living.—General Demurrer.

This case stood in the paper, and was to have been argued this day, by *Morgan*, for the plaintiffs, and *Wood*, for the defendants; but *Wood* admitted, that he could not support the replication, on the authority of *Coke Littleton*, where it is laid down, "That a feme covert is of capacity to purchase of others without the consent of her husband, and that though he may disagree, and divest the estate, yet if he neither agree nor disagree, the purchase is good (a)."

He moved for leave to withdraw the replication, and reply, *de novo*, upon payment of costs; which was granted.

(a) Co. Litt. 3. a. Alfo 356. b.

Friday,
10th Nov.

WATERS against OGDEN and Another, Administrators of MREL.

If an executor or administrator plead *plene administravit* prater a certain sum, and afterwards to another action brought in the same term plead also *plene administravit* prater the same sum, and as to that sum that he had confessed it in the other action, such plea is a good bar.

* [453]

DEBT upon a bond against the administrators of the obligor.—Declaration of last Easter Term.—Plea, *Plene administravit*, except goods and chattels to the value of 48l. 2s. 10d. and with respect to the said 48l. 2s. 10d. that the *defendants had confessed assets to that amount to another action on a bond of the testator's, of the same term, and then depending against them.—General Demurrer.

Bower, for the plaintiff,—An action depending and a confession of assets, without judgment, is not a good plea in bar to an action against executors or administrators. In the other action against the defendants, it is probable the plaintiff suspected the truth of the plea, and therefore took time to enquire into the fact, before he would sign judgment for the 48l. 2s. 10d. If such a plea as this were to be allowed as a bar to another action, a door would be opened to the most palpable fraud, by collusion between the defendant and some friendly creditor, which other *bona fide* creditors might never be able to prove; assets might be confessed and protected by such a plea, and all other demands frustrated, although the first plaintiff should never proceed, nor mean to proceed to judgment. It is not priority of action but of judgment which gives a preference to creditors in the same degree. He who first obtains judgment is entitled to be first paid, and here it ought to be considered as the *laches* of the plaintiff in the other action, that he did not enter up judgment of the assets confessed. It is true an executor or administrator cannot pay a debt of the same degree, after action brought and notice given of such action, unless there is judgment for the debt which he

he pays, but he may pay such debt after judgment, and he is intitled to give it a preference by imparlances and pleading dilatory pleas to the first action, and, in the mean time, confessing judgment for the second demand. This is laid down in *Wentworth's* Office of Executors (a), and in the case of *Blundwell v. Looerdel* (b), where the court distinguishes between such a preference given by the consent of an executor or administrator, in favour of a just debt, and where a debt is set up by covin and collusion. The defendants, here, were in no danger of being obliged to pay the amount of the assets in their hands twice over, for if they had confessed judgment to the present plaintiff, they might have availed themselves of that judgment in a plea of *placitum darrein continuance* to the other action,

1780.

WATERS
against
OGDEN,

Wood, for the defendants.—If this plea is not a good bar, executors and administrators will be under great difficulties, and liable, in numberless instances, to account for the same assets to two or many different creditors. What other step was left for the present defendants to take? The two actions were brought at one and the same time, (and by the same attorney.) They had only the sum confessed by the plea in their hands, and could not divide it between the two creditors: for, if they had confessed one half of it to each, and they had replied assets *ultra*, and issues had been joined, verdicts must have been found against the defendants in both actions. They could not make a voluntary payment to the one, after notice of the action by the other. In short, they had nothing left but to apply the assets by pleading, to one of the demands, and thereby put the plaintiff in that action in a situation to recover judgment, and then plead their having done so, in answer to the other demand. In an anonymous case in *Shower* (c) it is said, that, in case an executor have three or four bonds against him, and they all come to trial at once, being for 20*l.* a-piece, and the executor hath assets to the amount only of 20*l.* yet he shall be chargeable to them all; therefore it would have been best for him to have confessed a judgment to one of them, and that he might have pleaded to the other. Now the defendants have done all that depended on them to act in the manner there pointed out. The judgment itself is not in their power, it is the act of the court, which ought to follow of course on the confession of assets to the other plaintiff, and it is not to be presumed that he will neglect to avail himself of it. The plea confessing assets to him on the records of the court, is a notorious and public appropriation of those assets to his debt. If the plea was fraudulent or collusive, that might be replied,

Lord

[454]

(a) 145. (b) C. B. Hil. 12. Car. 2.
1 Sid. 21.

(c) B. R. Easter, 34 Car. 2.
2 Shower, 202.

1780.

WATERS
against
OGDEN.

Lord MANSFIELD having asked *Wood*, if he had ever seen such a plea, he said he had not, but that there was no case nor authority against it; upon which his Lordship said he thought the plea accounted very properly for the assents; that the plaintiff was endeavouring unjustly to compel the defendants to pay the amount of the assents twice over; and unless there had been the strongest authorities against the plea, it ought to be supported.

WILLES and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—This is certainly a new case; I believe there never has been such a plea before; but justice is so clearly in favour of the executors, that, unless there were the strongest authorities against the plea, the court must support it. This is a case which is entitled to greater favour than where there is a priority in the judgment and not in the plea; for as to confessing judgment, that is an act of preference shewn by the executors themselves, but here the preference has been obtained by the greater vigilance of one of the plaintiffs, in calling for a plea before the other. All legal means may be used to obtain such a preference. The defendants, in the first plea they put in, told the real truth of their situation, which they were obliged to do, and having confessed assents to a certain amount, they became bound by the course of law, to pay those assents to the plaintiff in that action. Shall not this be a sufficient answer to the other demand? It would be a monstrous hardship indeed, if the defendants should be obliged to pay the money twice over, and be turned round to seek for redress in a court of equity. I therefore think this is a good plea.

Bower moved, and had leave, (on the ground of the case being new,) to withdraw the demurrer, on payment of costs, the defendants to be at liberty to amend their plea, by stating the judgment which in the mean time had been entered up in the other action, the plaintiff to pay the expence of this amendment, and to take judgment of assents *quando acciderint*.

Friday
30th Nov.

EATON against JAKES.

If a term is assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, right, title, interest, &c. of the mortgagor, even after the mortgage has been forfeited, unless the mortgagee has taken actual possession.

THIS was an action of debt for rent, against the defendant as assignee of one *Denys*, the original lessee.—The declaration stated an indenture of lease from the plaintiff to *Denys*, his executors, administrators, and assigns, for 21 years, at a rent therein mentioned; that *Denys* by virtue thereof entered and became possessed of the premises; and “that being so possessed, on the 21st of June, 1777, all the estate, right, title, term of years to come and unexpired, property, profit, claim, and demand whatsoever of the said *Denys*, of, in, and to the said demised premises, by assignment

1780.

EATON
against
JAQUES.
[456]

assignment thereof then duly made, came to and vested in the defendant, by reason whereof the defendant became, and was, and from thence hitherto had been, and still was, possessed of and in the said demised premises; and that since he was and became assignee as aforesaid, a year's rent had become due at *Christmas* 1779, and was in arrear."—The defendant pleaded, That all the estate, right, title, &c. (in the words of the declaration,) did not come to and vest in the defendant, by assignment thereof, and that he was not possessed of and in the said demised premises in manner and form, &c.—*Issue* being joined upon this plea, the cause came on for trial, before BULLER, *Justice*, at the sittings for *Midd'esex*, in last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court, upon a case which set forth—"That, on the first of *December* 1775, the plaintiff demised the premises in question to Denys, as stated in the declaration; That, on the 21st of *June* 1777, by indenture made between the said Denys, of the one part, and the defendant of the other part, after reciting the said indenture of lease, the said Denys, (for the considerations therein mentioned,) bargained, sold, assigned, transferred, and set over unto the defendant, his executors, administrators and assigns, the premises demised by the lease, and all the estate, right, title, interest, benefit of renewal, term of years, and time to come and unexpired, property, profit, claim, and demand whatsoever of the said Denys, of and in the same, by virtue of the said lease, or otherwise howsoever, to hold unto the defendant for all the rest, residue and remainder of the said term of 21 years, by the said indenture of lease demised, and subject nevertheless to the rents and covenants therein contained, and which are on the tenant's part to be paid, kept, and performed, in which said indenture is contained a proviso for making the same void on payment of 114*l.* and interest at 5 per cent. per annum in manner following, viz. 2*l.* 17*s.* being half a year's interest thereof, on the 21st of *December* then next ensuing the further sum of 2*l.* 17*s.* on the 21st of *June* 1778, the further sum of 2*l.* 17*s.* on the 21st of *December* in that year, and the further sum of 116. 17*s.* on the 21st of *June* 1779; and there is another proviso and agreement between the parties that, until default should be made in payment of the 114*l.* and interest, contrary to the intent of the said proviso, it shall be lawful for the said Denys, his executors, administrators and assigns, to hold and enjoy the premises without interruption from the defendant; That the interest which became due on the said mortgage, was regularly paid up to and on the 21st day of *December* 1778; That the defendant never had possession of the house under the mortgage.—The question submitted to the court was, Whether the plaintiff was entitled to recover the rent

1780.

EATON
against
JAQUES

rent which became due at *Christmas* 1779, from the defendant.

Wood, for the plaintiff,—The only question is, Whether an action of debt will lie against the assignee of a lease before he takes actual possession? In the *first* place, it will certainly lie against an original lessee for years, before entry. This is settled by the case of *Bellasis v. Burdett* (a), where it was held, that, in debt for rent, upon a lease *at will*, the plaintiff must shew an *occupation*, because, the rent being due only in respect thereof, it must appear to the court when the lessee entered, and how long he occupied; but that, on a lease *for years*, entry or *occupation* need ~~not be shewn~~, for, though the defendant neither enters nor occupies, he must pay the rent, it being due by the lease on contract, and not by the occupation. So in *Coke Littleton* (b) it is laid down, that a lessee for years before entry hath an interest which he may grant over to another. *Secondly*, in what respect does the situation of an assignee differ from that of the original lessee before entry? Is there more solemnity required in transferring property to an assignee than to a lessee? The assignment vests the complete interest of the lessee in the assignee. In *Cook v. Harris* (c), which was an action of debt for rent against the assignee of a term, it is said, by Lord HOLT, that the ancient method of pleading assignments was "*virtute cuius*" the assignee entered and was possessed, but that this method was now disused, for the assignee had the estate in him before entry. If he has the estate of the lessee in him, he must be liable to the same conditions to which the lessee himself was subject before entry. It is true, there is a *proviso* in this assignment that the lessee shall hold the premises till default shall be made in the payment of the interest, but still the whole legal property vested in the mortgagee from the time of the assignment, and the mortgagor became his mere tenant by sufferance, and might have been turned out by an ejectment without notice, as soon as there was a default of payment; which there was in this case before the rent now sued for became due. Suppose the premises had been under let by the mortgagor; the mortgagee might have brought an action for the rent against the under-tenant, according to the late determination of this court in the case of *Mose Gallimore* (d). Suppose there had been an actual demise of the whole absolutely to the defendant, and he had made separate under-lease to the mortgagor to continue till there should be a default in the payment of interest or principal; could there be any doubt that, in such case, the defendant would have been liable to an action for the rent? Hence the same thing has been done in substance, only by one instrument

[458]

(a) C. B. M. 8 Will. 3. 1 Salk.
200. S. C. 1. L. Raym. 170.

(b) 46. b.

(c) B. R. M. 10 Will. 3. 1
Raym. 367.

(d) M. 20 Geo. 3. *supra*, p. 27.

instrument instead of two. This is very different from the case of a lease for lives, where livery of seisin is necessary, without which the delivery of the deed is not sufficient to give effect to the conveyance. By the very terms of the assignment, the defendant is made liable for the rent, and subject to the covenants.

1780.

EATON
against
JAQUES.

Rooke, for the defendant,—This is a question of great importance to all mortgagees. It amounts to this; whether a mortgagee of a lease for years, who has never taken possession, may be compelled by a stranger, to submit to all the conditions and covenants in the lease, although he is willing to wave all benefit from it. The inconvenience of such a doctrine would be monstrous. A mortgagee might lose his capital and interest, and also be compelled to pay rent, without deriving a farthing from the estate. But where is the hardship on the landlord if the action is not sustained? He has chosen his own lessee; he never depended on the credit of the assignee; and the only implied bargain he has made with the lessee relative to assignment, is, that if he lets another into the enjoyment of the estate, that person shall be liable. Is the defendant an assignee of that sort whom the law considers as liable? The plaintiff has declared that *all* the estate, right, title, &c. came to the defendant, and that by reason thereof, he became possessed. Is this true in fact? Lord HOLL's *dictum* in *Cook v. Harris* was extra-judicial, and, both before and since that time, all declarations in this court, against assignees, have stated entry and possession — (BULLER, *Jussice*, assented to this, and said it was so in all the courts.)—Here, there is no possession; and, besides, *all* the estate, right, &c. was not assigned, for the court will take notice of the difference between an absolute assignment, and one which is conditional, and made only to secure the payment of money. The point decided in *Moss v. Gallimore* was, that a mortgagee may distrain for the rent, before actual entry; but he must give notice of the assignment to the tenant, and by so doing he avows, instead of waving his interest under the assignment. But the tenant could not compel him to enter, or receive the rent. I admit that debt lies against the original lessee, before entry, because between him and the landlord, there is a privity of *contract*. But here there is not, nor any privity of *estate*, till possession. It will be asked, if the assignee can disavow the assignment or not, as he pleases, before entry? I answer, that, as between him and the landlord, he cannot, because of the privity of *contract* between them; but, as between him and other persons, he may.

Wood, in reply,—It does not appear, upon the case stated, that the mortgagee has waved all benefit of the mortgage. Indeed how could he wave it? It was his own fault

[459]

1780.

EATON
against
JAQUES.

fault to take it, and it cannot be surrendered but by a written conveyance. There is no distinction between an absolute and a conditional assignment with regard to the present question. Besides, when the mortgage was forfeited, the assignment to the defendant became absolute, and he then was complete owner. As to the possession alledged in the declaration, that is a mere inference of law, and is not traversable. It has been decided over and over again, that, if a deed is declared upon, and, after stating the deed, the declaration proceeds *virtute cujus*, &c. the deed only, not the subsequent part, can be traversed. After the forfeiture, the mortgagee might have brought an ejectment, and might then have recovered the mesne profits from the time of the forfeiture.

Lord MANSFIELD,—In point of fact, this case must have existed for a century past, in a thousand instances; in this great town particularly, building leases have been, and are, perpetually mortgaged; and yet no instance has been found where the ground landlord has attempted to charge the mortgagee, not in possession, with the rent or covenants. This is a strong argument against the plaintiff, especially where the case is so hard, so unjust, and unconscionable. Numberless inconveniences would arise, if such a demand could be supported. The mortgagee never asks whether the rent is paid; he only looks to his security; and, when the principal and interest are paid, he re-assigns. But, if the plaintiff is right, a mortgagee might be called upon, years after such re-assignment, for arrears or breaches of covenant during the assignment; the consequences would be terrible. And all this arises from a mere slip in the attorney, in making the conveyance; for if he had made it an under-lease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee (a). Though no cases have been cited at the bar which apply to the present question, we have found two in *Vernon*, which I will state, that it may not be supposed, after this judgment, that they were overlooked.—The first is the case of *Sparkes v. Smith* (b). A bill having been filed against the mortgagee of a term, to compel him to discover whether the lease had not been assigned to him, and to perform the covenants, the court said, that, as the defendant was only a mortgagee, and never had been in possession, they would not assist the plaintiff to charge him, or decree him to perform the covenants.—The other case is that of *Pilkington v. Shaller* (c), which certainly cannot be supported; for the court, there, refused to relieve the mortgagee, *because it was his own fault to take an assignment of the whole term, and not an under-lease*; but that is a

very

(a) *Holford v. Hatch*, E. 19 Geo. 3.
supra, 163.

(b) *Canc. M.* 1692. 2 *Vern.* 275.
(c) *Canc. T.* 1700. 2 *Vern.* 374.

1780.

EATON
against
JAKES.

very uncommon ground of relief in equity.—These cases, therefore, leave the question as it stood upon the argument at the bar; and, there being no solemn well-considered decision, we must resort to principles. In leases, the lessee being a party to the original contract, continues always liable, notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burthen while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable. To do justice between men, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties. The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say it was an absolute conveyance? It was a mere security; and it was not, nor ever is, meant, that possession should be taken till default of payment, and the money has been demanded. The legal forfeiture has only accrued six months, and if the mortgagee had wanted possession, he could not have entered *viâ facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law. It was not an assignment of *all* the mortgagor's estate, right, title, &c.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—It was admitted at *Nisi Prius*, that this was a new question [1]. I therefore could only form my opinion upon general principles, which I did in favour of the defendant, both from the justice of the case, and the constant form of pleading. But, the point being new, I thought it fit to be brought before the court, for their decision. It has been argued, at the bar, on a supposed analogy to different cases. The case of *Bellasis v. Burbreck* (a) makes rather against the plaintiff. Why is it there said that a lessee for years is liable, without entry? Because the rent is due *by him* in respect of the contract. But an assignee is only liable in respect of the thing enjoyed; and, therefore, the present case is more like that first put in that *ot Bellasis v. Burbreck*, *viz.* the case of a lessee at will, who is only liable in respect of his occupation. The other authority mentioned on the part of the plaintiff is merely a *dictum* of Lord Holt, who was clearly mistaken as to the form of pleading; for I have looked into the precedents, and they always alledge "*virtute cuius*" the assignee entered and *was possessed*. Besides, Lord Holt does not say that the assignee has the estate in him to *all* purposes before entry, and I admit that, to *many* purposes, it passes by the delivery

[461]

[1] It appears that, in fact, in *Pilkington v. Shaller*, a lessor had recovered at law against a mortgagee who had never been in possession; but it is probable no defence had been made.

(a) *Supra*, p. 457. Note (a).

1780.

EATON
against
JAQUES.

livery of the deed. For the reasons given by my Lord, I think there is a great difference between an absolute and a conditional assignment, in the nature of the contract itself. In the one case the assignee has the substance; in the other only a shadow. But I do not agree with Mr. Wood, that if even the assignment were absolute, the action would lie, without possession. There is no instance. The distinction between a naked right, and the beneficial enjoyment, is founded in sound reason; and there are authorities in *Danvers's Abridgment, Title Rent (b)*, where the court declared that the ground upon which assignees are made liable is because they have enjoyed the profits. I do not wonder that there are no old cases on this question; it is probably by means of the register act, which enables strangers to pry into other people's titles, that this mortgage has been discovered. But the question here being, whether mere nominal assignees with the naked right, or only substantial assignees in the actual enjoyment of the estate, shall be liable to this action, I think that only those of the last description are liable.

The *Posse* to be delivered to the defendant [1].

(b) 2 Dan. 484.

[1] The following case was determined in this court, M. 22 Geo. 3.

WALKER v. REEVES.

Cotenant for rent reserved upon a lease, by an assignee of the reversion against an assignee of the original lessee. The defendant pleaded two different pleas. The first was demurred to. In the second he stated, that, before the rent in question became due, he assigned all the estate, title,

[462] interest, and term of years which he then had to come in the premises, to one Riggs, by virtue of which assignment Riggs entered, and was, and still is, possessed thereof, &c. To this plea the plaintiff replied, that, at and after the time when the rent in question became due, the defendant remained and continued in possession of the premises, without this, that the said Riggs, at any time before the rent became due, and in arrear, entered into the premises, and was possessed thereof. The defendant demurred to this replication, and shewed for cause, that the plaintiff had therein traversed, and attempted to put in issue, matter of law only, and not any matter traversable or issuable. The case was argued, on Tuesday, the 9th of November, by Bower,

for the plaintiff, and Chambre for the defendant. Bower relied on the case of *Eaton v. Jaques*, and contended, that it followed from the doctrine of the court there, that, till a second assignee enters and takes possession, the first continues liable to the rent and covenants. Chambre said it was unnecessary, and would be indecent, for him to controvert the case of *Eaton v. Jaques*, but insisted that the determination of that case turned principally upon the assignment appearing to be a mortgage and security for money, and not a substantial transfer of the property. That none of the reasoning in that case was applicable to an absolute assignment without entry, except the observation, that all the precedents aver actual entry and possession. But he insisted, that there were no instances of that averment having ever been traversed; that it was immaterial, like the allegation "of being thereunto requested" in actions of *assumpsit*, and many other averments as to time, place, &c. which are not traversable: he said, that, in both the cases in *Vernon*, cited by Lord Mansfield in *Eaton v. Jaques*, the court of Chancery took it for clear law, that covenant would lie against an assignee before entry; but that it was enough for him to shew that the defendant in the

action was not liable: he was not bound to prove that the last assignee was. As to this he cited the same passage in *Coke Littleton* which *Wood* had done in *Eaton v. Jaques*, and also *Littl.* § 289. and 5 Co. 124. b. to shew what interest passes to a lessee before entry, and concluded; that as large an interest must pass from a lessee to his assignee, or from one assignee to another, before entry, and therefore, in such cases, nothing more remained with the lessee or mesne assignee, but a mere naked possession, without any right, exactly as if he never had any other right: That this was not such a privity of estate as could support an action of covenant: and when the assignment had been made, as in the case before the court, not by an original lessee, but by a mesne assignee, it would follow, that as he had no privity of contract with the lessor, no ground would remain to support the action against him. *Bower* having said, that if mesne assignees could, by fraudulent and secret assignments, discharge themselves, and still retain the possession and enjoyment of the estate, it would be attended with great inconvenience to lessors, *Chambre* answered, that if the second assignment had been made fraudulently in this case, the fraud should have been averred, as was done in a case in *Vent.* 329. 331. Ann. He also mentioned *Lekeux v. Nash*, H. 18 Geo. 2. 2 Str. 1221. as another authority to shew that a fraud in the assignment cannot be taken advantage of unless it is pleaded.—The court took time to consider, and on Friday, 16 Nov. Lord Mansfield delivered their opinion. He said, they did not enter into the merits of the first plea, (and of which I have not taken any notice, both for that reason, and be-

cause it was not at all applicable to the case in the text,) for that they were unanimous in thinking that the replication to the second was not good, unless it had gone farther, and charged the second assignment to have been fraudulent. By the assignment, the title and possessory right passed, and the assignee became possessed in law. As to actual possession, that must depend on the nature of the property, whether it can take place. It might be a waste or unprofitable ground, as seemed to have been the case here.—(From the first plea it appeared to be ground meant to be built upon.)—This case was by no means like *Eaton v. Jaques*, for the assignment there, being a mortgage from the nature of the transaction, it was not an assignment to this purpose; it was a mere security; till the mortgagee called for his money, the mortgagor was to be left in possession, and to pay the interest; and it was not understood by either of the parties, that the mortgagee should be liable for the rent.

In point of fact, the last assignment in this case of *Walker v. Reeves* was only as a mortgage security. Therefore, if the plaintiff, instead of replying that *Riggs* did not take possession, had traversed, by his [463] replication, the allegation of the plea, that the defendant had assigned all the estate, title, interest, &c. and upon issue being joined, it had appeared on the trial, that the assignment contained a proviso of redemption, it should seem that he would have been entitled to a verdict, on the authority of *Eaton v. Jaques*.

1780.

EATON
against
JAQUES.

The KING against ADDERLEY.

Monday.
13th Nov.

THIS was a rule to shew cause, why a *superfedeas* should not be granted upon an attachment issued against the defendant for not obeying a rule, to return a writ which had been directed to him when sheriff of Warwickshire.

By the true construction of 20 Geo. 3. c. 31. § 2. a sheriff is not liable to be called upon to return process.

unless within six lunar months after the expiration of his office, and the day on which he goes out of office is to be reckoned as part of the six months.

1780.

The KING
against
ADDERLEY.

The facts of the case were; That the defendant went out of office on the 12th of *February* last, at four o'clock in the afternoon, and was not served with the rule in question till the 30th of *July* following. By 20 *Geo. 2. c. 37. § 2.* It is enacted, "That no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required [] so to do within six months after the expiration of his office," and a month in law is a lunar month, or twenty-eight days, unless otherwise expressed (a). *February*, in this year, consisted of twenty-eight days, and, therefore, if the day on which the office expired was to be reckoned in, to make up the six months, the rule was served a day too late, and the defendant was entitled to the protection of the statute.

On *Tuesday*, the 7th of *November*, the case was argued, by the *Attorney General*, and *Wheeler*, in support of the rule, and by *Dunning*, on the other side.

Three questions were made, *viz.* 1. Whether the day of quitting the office should be considered as included in the six months, or excluded? 2. Whether the proceeding by attachment was not irregular, the defendant being no longer an officer of the court, and whether the process ought not to have been a *distingas*? 3. Whether the defendant, if not protected by the statute, must pay a fine equal to the whole debt, or whether he was not entitled to relief, upon equitable circumstances to be laid before the court by affidavit?

[464]

1. On the first question, the court were, at first, of opinion, that the day on which the old sheriff quits his office, was not to be reckoned in the six months; for there is no fraction of a day, and he might be called upon to act in the course of that day.

2. As to the second question, it was argued, on the part of the defendant, that the same practice ought to obtain with regard to rules to return writs, and rules to bring in the body, and that, in the latter cases, the proceeding against the old sheriff is always by *distingas*. The master, however, on being referred to by the court, certified that a difference had always prevailed, and that, for not obeying a rule for returning a writ, the constant course is to proceed by attachment; and *BUTLER, Justice*, stated a reason for the distinction, for he observed, that the writ in strictness, ought to have been returned before the old sheriff was out of office, and therefore the contempt was actually committed while he was a servant of the court.

3. With

[] It is not sufficient for the party to require the sheriff to return the writ; he must have been served with a rule of court for that purpose within the six months, otherwise an attachment can-

not issue against him, the only way to require him to return a writ being by a rule and process of the court. *R. v. Jones, B. R. T. 27 Geo. 3. Term Rep. 1. (a) 2 Black. Comm. 141.*

3. With regard to the *third* question, Lord MANSFIELD said, he did not recollect any instance where the court had exercised an equitable jurisdiction in such a case as this, by enquiring into the actual damage sustained by the default of the defendant, and compelling him to make satisfaction only to that extent. The matter then referred to, said he knew of no such instance; but BULLER, *Justice*, seemed to consider, that when the sheriff should come to purge the contempt, it would be competent for the court to moderate the punishment, and not impose a fine to the amount of the whole debt, though, in order to proportion it to the actual damages, he thought they must be ascertained by a jury.

1780.

The King
against
ADDERLEY.

Lord MANSFIELD then observed, that this question was not then before the court; and ASHHURST, *Justice*, having proposed that the attachment should lie in the office for 10 days, with liberty for the defendant to apply, in the mean time, to have it set aside upon terms, a rule was pronounced to that effect.

Afterwards, on this day, Lord MANSFIELD delivered the opinion of the court, as follows.

Lord MANSFIELD,--We have altered our opinion on this case, upon grounds which I will mention. The old sheriff, on the 12th of *February*, turned over, by indenture, to his successor, all un-executed process (a). The act, by its title, purports to be made for the ease of sheriffs with regard to the return of process. We find in the case of *Bellasis v. Hester*, reported by Lord Raymond (b), that it is laid down by the majority of the court, that where the computation is to be made from an act done (as from the sight of a bill of exchange by the acceptor, which was the case there), the day when such act was done is to be included. Now here the act of quitting the office by turning over the writs, &c. to the new sheriff was done by the defendant on the 12th of *February*. So, in the case of *Norris v. The Hundred of Gauris*, mentioned in *Roll's Abridgment* (c), and reported in 1 *Brownlow* (d), which was an action on the statute of *Hue & Cry*, the robbery was laid, and proved to have been, on the 9th day of *October*, 13 *Jac.* 1. and the writ was tested the 9th of *October*, 14 *Jac.* 1. and the words of the statute of *Elizabeth* (e) being, "That no person shall take any benefit, &c. except he or they so robbed shall commence his or their suit or action within one year next after such robbery, &c." (f), it was held, that the day when the robbery was committed, was to be included in the year, and that the action was brought too late; and judgment was arrested

[465]

(a) 20 *Geo.* 2. c. 37. § 1.(b) *B. R. M.* 9 *Will.* 3. 1 *Ld Raym.*

280.

(c) 2 *Roll. Abr.* 520. pl. 8.

VOL. II.

(d) 1 *Brownl.* 156 *S. C.* more fully reported *Hob.* 139.(e) 27 *El.* c. 13.

(f) § 9.

1780.

The KING
against
ARDERLEY.

arrested after verdict. The words of the statute of 20 Geo. 2. are the same as those of 27 Eliz. and this being a penal proceeding against the defendant, who is intitled to the most favourable construction of a statute expressly made for the ease of sheriffs, we think the day of his leaving the office is to be computed as part of the six months, and, therefore, the rule to return the writ came too late.

The rule for a *superfedeas* made absolute.

Monday,
13th Nov.

The KING against BARRAT.

If a parish-officer make an alteration in a poor-rate, after it has been allowed by two justices, but with the approbation of the justices, he shall not be punished by information.

* [466]

THIS was a rule to shew cause, why an information should not be filed against the defendant, as one of the overseers of the poor for the borough of *Stockbridge*. The offence charged by the affidavits was, that, after the poor-rate had been signed by the parish-officers, and allowed by the justices, the defendant had altered it, by interlining an article of one *Geary* for a tenement in the borough. It appeared that *Geary's* landlord, * (since one of the members returned for the borough,) had been rated for this tenement for the two preceding years, and the prosecutor swore that he believed the alteration was made to serve election purposes.

On the other side, it appeared, that the defendant had the concurrence of the other parish-officers and the permission and approbation of the justices, and he positively swore that he had not acted with any view to election purposes. It also appeared that there was no vacancy at the time; that the rates are made at *Stockbridge* every month; and that *Geary's* name had been inserted in a subsequent rate, which was made previous to the election, and had been suffered to remain without any appeal.

LORD MANSFIELD said, that, in granting informations, the court always looked to the motive: that, the defendant had acted improperly, but with the sanction of the magistrates' approbation, it was very natural for him to fall into such a mistake, and he denied positively having acted with any view to election purposes, which indeed the circumstances shewed could not have been answered by what he had done: the crime, if any, was in the justices, and they ought to have been the objects of the application: however, as the conduct of the defendant was irregular, the court would not discharge the rule with costs.

Dunning, and *Lee*, in support of the rule. The Attorney General, *Widmore*, and *Burton*, for the defendant.

The rule discharged.

HAWKINS *against* MAGNALL.

1780.

Wednesday,
15th Nov.The keeper
of a prison
cannot be
bail.

BOWER opposed one of the bail in this cause, on the ground of his being the *Keeper of the Poultry Compter*. *Baldwin*, on the other side, contended, that the rule prohibiting officers from becoming bail, extends only to those of the court where the action is brought; but *BULLEN, Justice*, said, there was no such distinction [†103], and, though *Bower* was afterwards instructed to waive the objection, the court declared they must reject the bail, to preserve the uniformity of practice [†1].

[†103] *Vide Bolland v. Fritchard*,
C. B. H. 12 Geo. 3. 2. *Blackst.* 799.

[†1] By the rules and orders of B. R. M. 1654. § 1. "It is ordered, that, for the prevention of malice, waste and dracage, no attorney be lessor in an ejectment, nor bail for a defendant, in this court,

[467] "in any action." There is also a similar rule in the same words among those of C. B. of the same term, § 1 [†5]. In a case of *Boulogne v. Vautrin* [†104], B. R. T. 18 Geo. 3. the clerk to the defendant's attorney was tendered as bail, and objected to, by *Douglas*, of counsel for the plaintiff, as being within the reason, though not the words, of the foregoing rule; and the court being of that opinion, he was rejected.—But if a person, who by the rules of the court is not permitted to become

bail, shall be put into the bail-piece, and not excepted to, the plaintiff cannot take an assignment of the bail-bond; and proceed upon it, as if no bail had been put in: This was determined in *B. R. E. 22 Geo. 3. Sat. 27 Apr.* in a case of *Thomson v. Roubell*.—The attorney for the defendant was one of his bail. The plaintiff did not except, but, considering the bail-piece as a mere nullity, took an assignment of the bail-bond, and brought an action upon it. *Mingay* moved to stay the proceedings, and the court held that the assignment was irregular, for that the bail-piece was not void; the attorney, although he ought not to have been bail, and was punishable by the court, being liable to the plaintiff, who, by not objecting, had accepted his security. *Bower* for the plaintiff [†105].

[†2] And by a rule of that court, M. 6 Geo. 2. It is ordered, that no attorney of this, or any other court, or any practising as such, shall be bail in any suit or action depending in this court. And on the construction of that rule, the court held in *Laing v. Cundale*, C. B. M. 29 Geo. 3. H. Bl. 76. that it extends to the attorned clerks of attorneys. But, in a criminal case, the defendant's attorney may be bail for him. Thus in *Rex v. Bowers*, the defendant was carried down to *Bulford*

assizes, Aug. 1787, under a rule of court, before *ASHHURST, Justice*, to give bail on articles of the peace exhibited against him by his wife, *Lady Strathmore*. One of the bail was objected to as being his attorney; but *ASHHURST, Justice*, held that the rule did not apply in criminal cases; However, the other bail appearing insufficient, the defendant was remanded.

[†104] Since reported, *Cowp.* 828.

[†105] *Vide Jackson v. Trinder*,
C. B. H. 18 Geo. 3. 2. *Blackst.* 1180.

1780.

COPE and Another against COOKE.

Wednesday,
15th Nov.
It is not sufficient for the plaintiff, in an affidavit to hold to bail, to swear that the defendant is indebted to him in so much upon promises.

ON Thursday, the 9th of November, *Mingay* had obtained a rule to shew cause, why the defendant should not be discharged, on filing common bail, on the ground that the affidavit on which he had been arrested, did not state the nature of the demand with sufficient certainty. The words were, That the defendant was indebted to "the plaintiffs in 200l. upon promises."

Bower, this day, shewed cause, and said, that all the statute (a) had been construed, (in the different cases,) to require, was that the fact of the debt being due should be stated with certainty, not argumentatively, and by reference to evidence. That, in this particular case, the circumstances were long and complicated, (the action being a special *assumpsit* on an undertaking relative to the sale of a chance in the *Irish Lottery*,) and it would have been impossible to set forth the ground of the demand without stating the whole substance of the declaration. He admitted that the original affidavit could not now be amended, nor its defects supplied by a supplementary one [†106].

[468]

The court were of opinion, that the affidavit was too general, but would not allow the defendant the costs of the application, which *Mingay* had moved for.

The rule made absolute [†107].

(a) 12 Geo. 1. c. 29. § 2.

[†106] Vide *Reeks v. Groneman*,

C. B. H. 4 Geo. 3. 2 Wilf. 224.

But by the present practice of the court of C. B. it should seem that such supplemental affidavit may be filed. *Hobson v. Campbell*, C. B. T. 29 Geo. 3. H. Bl. 245. 249.

[†107] So an affidavit that the de-

fendant is indebted to the plaintiff "in 23l. in trover," is bad. *Hubbard v. Pacheco*, C. B. E. 29 Geo. 3. H. Bl. 218. Vide also *Sheldon v. Baker*, B. R. H. 26. Geo. 3. Term Rep. 83. *Davis v. Muzzinghi*, B. R. E. 27 Geo. 3. 1 Term Rep. 705. *Mackenzie v. Mackenzie*, B. R. E. 27 Geo. 3. 1 Term Rep. 716.

Saturday,
18th Nov.

LOWRY and Another against BOURDIEU.

An Insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe.

THE plaintiffs had lent to *Lawson*, captain of the Lord *Holland East Indiaman*, 26,000l. for which he had given them a common bond, in the penal sum of 52,000l. While he was with his ship at *China*, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms: "At and from *China* to *London*, beginning the adventure, upon the goods

"from

" from the loading thereof on board the said ship at *Canton* in *China*, &c. upon the said ship, &c. from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.* being the amount of captain *Patrick Lawson's* common bond, payable to the parties as shall be described on the back of this policy; and it bears date the 16th day of *December* 1775; and, in case of loss, no other proof of interest to be required than the exhibition of the said bond: warranted free from average, and without benefit of salvage to the insurer."—At the head of the subscriptions was written, "On a bond as above expressed."—Captain *Lawson* sailed from *China*, and arrived safe with his privilege, (as it is called,) or adventure, in *London*, on the 1st of *July* 1777, none of the events insured against having happened. The receipt of the premium was acknowledged on the back of the policy. In 1780, the insured brought this action for a return of the premium, on the ground that, the policy being without interest, the contract was void. The cause came on before Lord *MANSFIELD*, at *Guildhall*, at the Sittings after the last *Trinity Term*, when his Lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo. 2. c. 37.* and both parties equally guilty of a breach of the law; that the rule, thereof, of *melior est conditio possidentis* was applicable to the case, and the plaintiffs could not recover the premium. A verdict was accordingly found for the defendant, agreeably to his Lordship's direction: but, the next morning, he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement which could never have been completed; and, the first day of this term, *Bearcroft* obtained a rule to shew cause, why a new trial should not be granted. He insisted, that the contract was to be considered as executory in its nature, the premium having been paid before the risk commenced. This day, cause was shewn, by the *Attorney General*, *Cowper*, and *Dunning*.

They contended, that, in truth, and substantially, the plaintiffs had an insurable interest. That, though this was, in form, a policy on the ship and goods, yet the bond was stated, in the very body of the policy itself, as the real interest of the insured. If there was no insurable interest, yet, as the plaintiffs paid the money with their eyes open, and not under any mistake of the law; as they expressly stipulated that the bond should be, between them and the underwriters, the only proof of interest that should be required, or, in other words, that it should pass for interest, as between them, whether the law considered it as such or not; as they most undoubtedly would have called upon the defendant if the ship

1780.

LOWRY
against
BOURDIEU.

[469]

1780.

LOWRY
against
BOUADINE.

had been lost; the court will not assist them in recovering the *premium*, although paid upon an illegal consideration. It may be said that, in case of a loss, the law would not have compelled the underwriters to pay. That may be true; but it would have been dishonourable in them to refuse, and the principle in such cases is, that the court ought to remain neutral. If the underwriters had, in fact, paid, the court would not have assisted them in recovering back their money, in an action for money had and received. Many cases of the same sort were mentioned by Lord MANSFIELD at the trial, where money, the payment of which could not have been compelled by law, having been actually and voluntarily paid, it cannot be recovered back in an action; as, for instance, money paid by an infant, or on *time-contracts* for the price of stocks. As to the payment of the *premium*, though there is a receipt for it on the policy, yet it is well known that, in point of fact, it is never paid at the time of underwriting, but remains an article in the current account between the broker and the underwriter.

[470]

Bearcroft, on the other side, argued, that as the plaintiffs could not have recovered for the loss, and had made the insurance under a mistake of the law, not with an intention to act against it, they ought to recover back the *premium*, as paid without any consideration. It happens every day that the *premium* is recovered back when it has been paid upon a mistake in point of law, if no fraud or illegal intention appears. The parties here were guilty of a blunder, and nothing more. If they had intended a fraud upon the statute, they would not have stated the nature of their supposed interest in the very policy itself. There are cases where even on a policy clearly illegal the *premium* has been decreed to be paid back, in a court of equity. In *Willingham v. Thornborough* (a), upon a bill brought to be relieved against an illegal policy, the court made it a condition that the plaintiff should return the *premium*. If it is said, that the reason of that decision was, that it is a rule in courts of equity never to give relief, even in cases of gross fraud, without ordering what is really due on either side to be paid, that rule will apply, and ought to govern, in the present case, for this court has often said, that mercantile questions ought to be decided in the courts of law according to equitable principles.

Lord MANSFIELD, — It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity

only

(a) *Canc. H. 1690, Proc. in Chanc. 20.*

only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case, the nature of the insurance is known to both parties. The plaintiffs say, "We mean to game; but we give our reason for it; Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us." It was a hedge. But they had no interest; for, if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been intitled to recover the amount of the bond from Lawson. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the court will not interfere to assist either party: according to the well known rule, that, in *pari delicto*, &c. Not that the defendant's right is better than that of the plaintiffs, but they must draw their remedy from pure fountains. I have returned to my old opinion; sometimes you miss the mark, by taking too long an aim.

WILLES, *Justice*,—I shall make no apology for differing from the rest of the court, in a case where such great abilities have entertained two different opinions. The premium has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the underwriters if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had an idea they were entering into an illegal contract. The whole was disclosed, and they thought there was an interest. This was a mistake, but it is a new point of law. The case cited from *Precedents in Chancery* is not perhaps decisive, but it goes a great way; and it would be very hard that a party should lose what he has paid under a mere mistake. I think in conscience the defendant ought to refund the premium.

ASHMURST, *Justice*,—I am clear that there ought not to be a new trial. A policy of insurance ought to be a mere contract of indemnity, and nothing more; but here the money might have been paid twice; which shews decisively that this was a gaming policy.

BULLER, *Justice*,—It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, that *ignorantia juris non excusat*. This was a mere gaming policy, without interest. There is a sound distinction between contracts executed and executory, and if an action

1780.

LOWRY
against
BOURDIEU.

[471]

1780.

LOWRY
against
BOURDIEU.

is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman* some years ago in this court, where a sum of money had been paid in order to procure a place in the *Customs*. The place had not been procured, and the party who had paid the money having brought his action to recover it back; it was held, that he should recover, because the contract remained executory. So, if the plaintiffs in the present case had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk, (such as it was, not indeed founded in law, but resting on the honour of the defendant,) had been completely run. It makes no difference whether the premium was paid before the voyage, or after it.

The rule discharged [10].

[472]

Lord MANSFIELD said, he desired it might not be understood, that the court held, that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon an usurious contract, it may be recovered, for, in such cases, the parties are not *in pari delicto* (a).

[10] *Vide Andree v. Fletcher*, B. R. E. 29 Geo. 3. 3 Term Rep. 266 where it was held that a premium paid, on a re-assurance void by 19 Geo. 2. cap. 37. cannot be recovered back.

(a) *Vide Jones v. Barkley*, T. 21

Geo. 3. *infra*, p. 695. Note [3]. *Smith v. Bromley*, N. Pr. E. 1760. *infra*, 696. *Jaques v. Witley*, C. B. T. 28 Geo. 3. H. Bl. 65. *Cockshot v. Bennett*, B. R. M. 29 Geo. 3. 2 Term Rep. 763. 766.

Saturday,
18th Nov.

BROWN against RIVERS.

If a person who has been discharged by an insolvent act brings an action, and recovers, on a promissory note made payable to him before his imprisonment, but not due till after his discharge, and which was not inserted in

THIS was an action of *assumpsit* brought by the plaintiff as payee of a promissory note, drawn by the defendant, for 45*l.* bearing date the 1st of November 1777, and payable to the plaintiff, or his order, twelve months after date. The plaintiff had pledged his note with one *Crowe* for 20*l.* In November 1777, the plaintiff was arrested and imprisoned, and, in June 1778, was discharged under the insolvent act of 18 Geo. 2. c. 52. This note was not inserted in the schedule of his effects delivered in at the time of his discharge (a). There was an indorsement on it by the plaintiff in favour of *Crowe*, and some dispute arose between the counsel, whether this indorsement was made prior or subsequent to the imprisonment, but it

his schedule, he shall hold the money as a trustee for his assignees.

(a) 18 Geo. 2. c. 52. § 12.

was admitted that the note was pledged before the imprisonment. The declaration stated the insolvency of the plaintiff, his discharge, and that the note not being paid when it became due, he had, after his discharge, redeemed it from *Crowe*. The cause was tried before Lord MANSFIELD, at the Sittings after last *Trinity Term*, and a verdict found for the plaintiff, with damages to the full amount of the note.

1780.

BROWN
against
RIVERS.

On *Wednesday*, the 8th of *November*, *Morgan* obtained a rule to shew cause, why the verdict should not be set aside, and a nonsuit entered; and, this day, the case was argued, by the *Attorney General*, for the plaintiff, and *Dunning* and *Morgan*, for the defendant.

On the part of the defendant, it was contended, that, by the operation of the statute, § 14. this note became vested in the clerk of the peace, and, by his assignment, in the assignees; that the plaintiff had no longer any interest in it, and could not maintain the action.

[473]

On the other side, it was said, that the plaintiff had an interest in the note, to the amount of the 20*l.* and the action could not be split. He could not sue for that sum, and the assignees for the balance. Parties having different portions of interest in a note, cannot bring separate actions. The plaintiff was intitled to recover the whole, but would be a trustee for his creditors as to the balance beyond the 20*l.*

Lord MANSFIELD,—As between the plaintiff and defendant there can be no doubt. The plaintiff must recover the whole, and pay over, what exceeds the sum he has advanced since his discharge, to his assignees.

The rule discharged.

DEN, Lessee of TAYLOR, against The Earl of ABINGDON.

Tuesday,
21st Nov.

THE lessor of the plaintiff having recovered a judgment against the defendant, sued out an *elegit* of his lands in the county of *Berks*, upon which an inquisition was taken, and returned by the sheriff; and this ejectment was brought to obtain possession under the *elegit*. The cause came on for trial before PERRY, *Baron*, at the Summer Assizes for *Berkshire*, on *Tuesday*, the 25th of *July* 1780, and the inquisition being produced, it appeared, that it mentioned by name all the different farms and tenements of the defendant's estate in the county consisted, with their value, the number of acres in each, be the same more or less, the tenants' names, yearly value besides reprises, and the clear yearly amount of the whole;

Upon an *elegit* the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole.

and

1780.

Don
against
Lord Abingdon.

[474]

and then, repeating the names of a certain number of them, their number of acres more or less, and yearly amount, it found that those particular farms and tenements were a true and equal moiety of all the said lands and premises of the defendant in the county, "which moiety of the said lands and premises, I, the said sheriff, on the day of taking this inquisition, have caused to be delivered to the lessor of the plaintiff, by the price and extent aforesaid, &c." Upon the production of this inquisition, *Cowper*, on the part of the defendant, objected, that the *alegit* had not been duly executed, and that the inquisition was void on the face of it, for that a moiety of each farm ought to have been extended and delivered to the lessor of the plaintiff, and not a certain number of distinct farms, amounting, in value, to a moiety of the whole. This objection being stated, and a passage in *Gilbert's Evidence* (a), taken from *Ventris* (b), cited in support of it, the Judge, and counsel on both sides, agreed that a case should be saved, setting forth the inquisition, in order to take the opinion of the court; subject to which opinion a verdict was found for the plaintiff.

Two days afterwards, a similar cause, between the same parties, came on, before *BULLER, Justice*, at *Oxford*, and a case was also saved in that cause, which was to abide the decision of the court on the former.

This day the question was argued, by *Baldwin*, for the plaintiff, and *Cowper*, for the defendant.

Baldwin contended, that the method in which the writ had been executed, and the inquisition taken, was entirely consonant to the statute of 13 *Edw. 1. stat. 1. c. 18.* by which the process by *elegit* was introduced. The words of the statute are, "The sheriff shall deliver to, (the plaintiff,) all the chattels of the debtor, (save only his oxen, and beasts of his plough,) and the one half of his land, until the debt be levied, upon a reasonable price or extent." There is nothing in these words that imports that the moiety of each farm or field is to be extended. Their natural sense is, that a moiety in value shall be delivered. The words of the writ pursue exactly those of the statute; and all the precedents in the books of practice, from *Rassall* to *Lilly*, resemble the inquisition in the present case (c). In some instances they do not even mention the particular lands. In *Brake's Abridgment*, Title *Elegit* (d), it is expressly laid down, "That, if *elegit* issue against one who hath two manors, the sheriff may deliver one of the manors to the plaintiff."

(a) 54.

(b) 1 *Vent.* 259.(c) *Rass.* 262. *Clift.* 877. 883.*Townsh. Judgments* 1. 17. 33: *Lilly* 574.(d) *Pl.* 14. 12 *Edw.* 4. 2.

"in the name of a moiety of the whole, and is not bound
 "to deliver a moiety of each manor; and so of two acres;
 "and this seems to be when they are of equal value."

1780.

DEN

against

Lord ABINGDON.

[475]

The only case to be found, which seems to warrant the doctrine contended for on the part of the defendant, is that of *Lord Stamford v. Nedham*, in *Levinz* (b). The report of that case by *Levinz* is very short and imperfect, but it seems to be the same which is reported, under a different name, viz. *Lord Stamford v. Hobart*, in *Siderfin* (c); for that is mentioned as of the same year and term; and, by that account of the case, it appears, that the only question was upon a suggestion that there had been a false return made to the *elegit*, and on the manner in which the defendant could get rid of it. It is true, that, in a variety of cases, it is laid down, that, upon an *elegit*, the sheriff must set out the moiety delivered, by *metes and bounds*. Thus in *Pullen v. Birkbeak*, reported in *Carthew* (d), Lord *Holt* says, "If, upon an *elegit*, the sheriff delivereth a moiety of a house without *metes and bounds*, such return is ill." In that supposed case, as there are not two houses of equal value, certain parts or rooms, equal in value to a moiety, must be set out; but the reason given by *Holt*, viz. that the return is ill for the uncertainty, shews that the only object of the *metes and bounds* is to ascertain and distinguish the parts extended and delivered in execution. There is a case in *Hutton* (e), to the same purpose. But there is no decision, nor dissent, except the case in *Levinz*, which authorizes the opinion that a moiety of each particular field, or farm, must be extended. The great inconvenience which would attend such a method of executing the writ is extremely obvious.

Cowper relied on the case in *Levinz*, as directly in point; and insisted, that the plain interpretation of the words of the statute were in his favour.

LORD MANSFIELD having asked him, what he said to the precedents, he answered, that he conceived they were no authority [1]; and, besides, that they differed from one another.

LORD MANSFIELD, — Mr. Baldwin, you need not reply: the reason of the thing is strongly with the practice, and in your favour.

BULLER,

(b) B. R. H. 16 & 17 Car. 2. 1. *lev* 160.

(c) B. R. H. 16 & 17 Car. 2. 1. *Sid* 239.

(d) B. R. T. 10 Will. 3. *Carth* 453.

(e) 16.

[1] In the case of *Buckley v. Rice*

Thomas, upon a demurrer, an entry in the old book of entries is cited, and relied on, by *Brooke*, Ch. J. and *Saunders*, J. as an authority to shew the proper form of declaring in an action for a false return, under 23 H. 6. c. 15. *Mund* 118. 126. 129.

1780.

DEN
against
Lord ABING-
DON.

* [476]

BULLER, *Justice*.—There are many other cases, besides what have been cited, which shew that the inquisition and return are * good, although separate lands have been extended, provided it does not appear that they amount in value to more than a moiety of the whole; 1 *Salk.* 563. 1 *Sid.* 91. *Cro. Car.* 319. Mr. Cowper's argument goes not only to every farm, but to every close and field. In short, the writ could not be executed according to his idea, but by delivering an undivided moiety. Yet most clearly that is not the meaning of the statute, for it is agreed the moiety extended must be set out by *metes and bounds* [1]. I take the meaning to be, a moiety in value; which is ascertained by the jury.

The *Poslea* to be delivered to the plaintiff.

[1] "L'exécution per force d'un *elegit* ferra fait del moyety per *metas* et *boundas*, & nemi, per *mie* & per *tout*." *Dalt.* 135: Cites 31 *Aff.* but I can find no such passage in the Book of *Affize*. The case in 1 *Vent.* 259. (*supra*, p. 474. Note (b),) which is referred to by Gilbert, was not cited

upon the argument. There was no decision in that case, the court differing in opinion; and the only question was, whether the return could be quashed *upon motion*, it not appearing that possession had been delivered by *metes and bounds*.

Tuesday,
21st Nov.

JEFFERY against WHITE.

If *oyer* is granted of any instrument of record, and it is set forth, although the party was not intitled to such *oyer*, yet he shall be thereby intitled to take the whole instrument as part of his adversary's plea.

[477]

TRESPASS for taking cattle; *Plea*, That they were taken damage feasant; *Replication*, a right of common; *Rejoinder*, stating, by way of inducement, part of a private act of parliament for inclosing the common, and an allotment, by the commissioners, of the *locus in quo* to the defendant, and traversing the right of common; *Oyer* prayed of the act, and granted; the whole act set forth; and then, *Demurren* to the rejoinder; and cause assigned, that it was not shewn by the rejoinder that the allotment had been made according to the directions of the act as set forth; *Joinder* in demurrer.

Power, for the plaintiff.—*Lawrence*, for the defendant.

For the defendant, it was argued, that a party is not entitled to *oyer* of acts of parliament, and that it cannot be granted, because they are not in the power of the court; and, for a similar reason, the party who relies upon them, cannot make *profert*, because he has them not to produce. That the plaintiff ought to have pleaded the record of the act, in a *surrejoinder*, and thereby have given the defendant an opportunity to take issue upon it. That by the plaintiff's setting it forth upon the *oyer*, and then demurring, the defendant was precluded from that advantage, and the plaintiff enabled to state it in whatever manner he pleased. That the court, therefore, ought to consider

consider the *oyer* and recital of the act, as a mere nullity; and that, upon what appeared in the defendant's rejoinder, the allotment was regular, and therefore the defence was sufficient.

Bower admitted, that *oyer* could not be compelled of an act of parliament [☆]; but insisted, that, as it had been in fact granted, the party who had demanded it was entitled to consider the whole of what was set forth as making part of his adversary's plea. For this he cited 6 *Mod.* 27. 1 *Saund.* 316, 317. and other authorities.

Judgment for the plaintiff.

[☆] Nor of a record, as letters *Amery, B. R. H. 26 Geo. 3. 1 Term* patent inrolled in *Chancery, Rex v. Rep.* 149.

GOODRIGHT, Lessee of HARE, Widow, against * [478]
CATOR and Others.

Wednesday,
22d Nov.

THIS was an ejectment brought to recover the possession of certain lands in the county of *Kent*. Upon the trial, the jury found a special verdict, which set forth, (as far as is material to be stated,) as follows:

That Lord *Bolingbroke* was seised in fee, (*inter alia*,) of the premises mentioned in the declaration: That, by indenture bearing date the 7th of *September* 1757, reciting, (*inter alia*,) an intended marriage between him and Lady *Diana Spencer*, in consideration of such intended marriage, and for other considerations therein mentioned, his Lordship covenanted with Lord *Pembroke* and Lord *Guilford*, parties thereto, that, in six months after the solemnization of the marriage, he would convey to the use of *I S.* and *W. B.* also parties thereto, certain manors, lands, &c. therein mentioned, for 99 years, for the purpose of raising a certain yearly sum for the separate use of Lady *Diana* during her and Lord *Bolingbroke's* joint lives, remainder to the use of Lord *Bolingbroke* for his life, without impeachment of waste, remainder, after his death, to trustees, for 990 years, without impeachment of waste, to the use and content that Lady * *Diana* should take and enjoy a certain yearly rent, during her life, for her jointure, and upon other trusts; remainder, after the determination of such term, to the first and other sons of the marriage, in strict settlement, with remainders over; That the premises in question were part of those contained in the said indenture; That in the same month of *September* 1757, the marriage took effect; That by indentures of lease and release, of the 3d and 4th of *November* 1765, in pursuance of the indenture of 1757, and in performance of the covenants therein contained, Lord *Bolingbroke* conveyed to the said Lord *Pembroke*

An estate being conveyed by a marriage settlement to trustees, to the use of the settlor for life, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate for his own life, in the settled estate, a revocation subsequent thereto, of all the uses, by him, with the consent of the trustees, shall not affect the estate granted for his life.—*Actual* entry is not necessary to take advantage, by ejectment, of a clause in a lease to re-enter for non-payment of rent.

1780.

JEFFERY
against
WHITE.

1780.

GOODRIGHT
against
CATOR.

[479]

Pembroke and Lord Guilford, the premises in the deed of 1757 contained, upon the same trusts, and for the same uses, as were in the said deed mentioned, with a power to Lord Bolingbroke, during his life, and the trustees during the minority of the children of the marriage, to grant leases for three lives, or for thirty-one years, (subject to certain restrictions, and solemnities particularly set forth.) That, in the said release of the 4th of November 1765, was contained a proviso of the tenor following, viz. "That if at any time during the life of the said Lord Bolingbroke it should be thought convenient by him, and the trustees, or the survivors, or survivor, and the heirs of such survivor, to sell, dispose of, or exchange, all, or any part of the said settled estates, and lay out the money arising therefrom in the purchase of others to be settled to the same uses, it should be lawful for Lord Bolingbroke, notwithstanding the said uses and limitations, with the consent of the trustees, by any deed or deeds with or without power of revocation, to be sealed and delivered by him, and the trustees, in the presence of two or more witnesses, to revoke, determine, annul and make void, all and every the uses, estates, trusts, and limitations, powers, provisos, authorities, and agreements, therein before limited, declared, created and contained, of and concerning the premises so to be sold, disposed of, or exchanged, and by the same, or any other deed or writing, to be sealed, and with such consent as aforesaid, to limit the same premises, or any of them, whereof the uses should be so revoked, to the said trustees, upon trust, that they, with the consent and approbation of Lord Bolingbroke, signified by a deed under his hand and seal, should absolutely sell and convey the same to any purchaser, or purchasers, his or their heirs, executors, or administrators, or should limit any such new uses, or trusts of the same, as should be requisite for effecting such sale, disposition, or exchange, and that on payment of the purchase-money, it should be lawful for the trustees to sign receipts for the same, which should be sufficient discharges to the purchaser, or purchasers, and that when any of the said premises should be sold, for a valuable consideration in money, and such receipt should be given, and also when any of them should be sold, disposed of, or exchanged for, or in lieu of any other manors, &c. and the fee simple of such last mentioned manors should be vested in the said trustees, all and every the premises, so sold, disposed of, or conveyed in exchange, should be, and remain for ever, thenceforth freed, and absolutely discharged from all the uses, estates, trusts, declarations, powers, provisos, and agreements, in and by the said indenture of release

1780.

Counsellor
against
Cavea.

" lease limited and declared concerning the same, and
 " then, and from thenceforth, these presents, and the
 " grant and release herein before contained, and hereby
 " made, shall be and inure, as to so much of the same
 " premises as shall be so respectively sold, disposed of,
 " or conveyed in exchange, to the only use or behoof of
 " such purchaser or purchasers, or of such other person
 " or persons to whom the same shall be respectively sold,
 " disposed of, or conveyed, and of his, her, or their heirs
 " and assigns, *subject only to such leases, as before such sale
 " or exchange shall have been made thereof, pursuant to the
 " powers herein before contained;* That on the 24th of
 July 1770, by an indenture between Lord Bolingbroke and
 Margaret Hare, widow, (the lessor of the plaintiff,) reciting
 that his Lordship had executed a bond to the lessor of
 the plaintiff, conditioned for the payment of an annuity
 of 500*l.* during his life, by quarterly payments, and that
 he had agreed to secure the said annuity upon certain
 estates, and that they should be conveyed to her for that
 purpose, it was witnessed that, in pursuance of such agree-
 ment, and in consideration of 3000*l.* paid to him, for
 the purchase of the said annuity, he granted, bargained,
 sold, and demised, to the said Margaret Hare, (*inter alia*),
 certain estates at Beckenham, in Kent, which estates were
 the premises mentioned in the declaration, and part of
 those contained in the deed of 1757, to have and to hold
 the same for 99 years, if he should so long live, subject
 to a pepper-corn rent, if demanded; That, by the same
 indenture, he covenanted, that he then stood lawfully
 seized of an estate for his life in the premises; That, by the
 said indenture, it was provided, declared, and agreed,
 that the said premises were so demised to the said Mar-
 garet Hare, upon an agreement, and to the intent, that
 she should lease back the same to him, and his assigns,
 for 98 years and 11 months, if he should so long live,
 under the rent of 500*l.* *per annum*; That an indenture
 of re-demise, bearing date the 25th of July 1770, in pur-
 suance of the above agreement, for the said term of 98
 years and 11 months, if Lord Bolingbroke should so long
 live, was made by Margaret Hare to him, subject to the
 rent of 500*l.* *per annum*, payable quarterly, and that such
 last-mentioned indenture contained a proviso, that, if the
 said yearly rent of 500*l.* should be behind, or unpaid, in
 part, or in all, *by the space of 28 days*, after any of the
 quarterly days of payment, *although no demand thereof
 should be lawfully made*, it should be lawful for the said
 Margaret Hare to re-enter; That memorials of the said
 indentures of the 24th and 25th of July 1770, were duly
 enrolled in Chancery, before the commencement of the
 action, in pursuance of the statute of 17 Geo. 3 c. 26.;
 That,

[480]

1780.

GOODRIGHT
against
CATON.

[481]

That, by an act of the 8th of *Geo. 3.* the marriage between Lord *Bolingbroke* and Lady *Diana* was dissolved, and it was enacted that she should, during her life, receive 800*l.* a year out of the premises contained in the deeds of 1757 and 1765, with power of distress and entry, to secure the payment thereof, and that the yearly sum for her separate use, and also the jointure settled on her, as aforesaid, should cease and be void; That, by indenture of the 20th of *October* 1773, between Lord *Bolingbroke* and the trustees in the deed of the 4th of *November* 1765, reciting that deed, and the power of revocation above set forth, and that it was thought convenient by Lord *Bolingbroke*, and the trustees, to sell the estates therein mentioned, (being the same with those granted and conveyed by the said deed of the 4th of *November* 1765,) and to lay out the monies arising from the sale thereof, in other lands, to be settled to the same uses, and subject to the same powers, provisos, &c. the said Lord *Bolingbroke*, by virtue and in pursuance of the power to him given by the said deed of the 4th of *November* 1765, and in execution thereof, did, with the consent and approbation of the said trustees, limit and appoint all the said estates, to the use of the said trustees upon trust, and to the intent that they, with the consent of Lord *Bolingbroke*, should sell and convey the same to any purchaser or purchasers, and should limit, create, &c. such new trusts, of and concerning the same, as should be necessary for executing and effecting such sale; That the defendant contracted with Lord *Bolingbroke* for the absolute purchase of the said estates, free from incumbrance, (except as in the said indenture of release, hereinafter mentioned, of the 22d of *October* 1773, is excepted,) for the price of 19,688*l.*; That, for conveying the same to the defendant, the trustees and Lord *Bolingbroke*, on the 21st of *October* 1779, for the consideration therein mentioned, bargained and sold the said estates, (*the same including the premises in the declaration mentioned,*) to the defendant, to have and to hold the same for a year, subject to a pepper-corn rent, if demanded, to the intent that a release of the same, in fee, might be granted to him; That, accordingly, by indenture of release of the 22d of *October* 1773; reciting the release of 1765, the deed of 1757, the deed of the 20th of *October* 1773, and the contract with the defendant; the said trustees, with the consent and approbation of Lord *Bolingbroke*, released to the defendant, all the said estates, &c. in the deed of the 20th of *October* specified, to the use of him and his heirs for ever; That the said last-mentioned indenture was duly executed, according to the tenor of the power of revocation and sale, in the deed of the 4th of *November* 1765; That the premises in the declaration

claration mentioned were *part of those so released to the defendant*; That the indenture of the 24th and 25th of July 1770, were not, nor was either of them, nor any incumbrance created by them, or either of them, excepted, or mentioned by the indenture of release, of the 22d of October 1773; That Lord *Bolingbroke*, by virtue of the said indentures of the 3d and 4th of November 1765, was tenant for life, and in the actual possession and receipt of the rents and profits of the premises in the declaration mentioned, at the time of the execution of the deeds of the 24th and 25th of July 1770; That the defendant, at the time of his contract for the aforesaid purchase, and of making the indentures of the 21st and 22d of October 1773, had due notice of the indentures of the 24th and 25th of July 1770, and of the yearly rent, or annuity, therein mentioned; That the defendant, and certain other persons, were, at the time of bringing the ejectment, and at the time of the trial, in possession of the premises in the declaration specified; That a quarterly payment of the annuity had been, and still was, in arrear for 28 days; And that on the 14th of June, &c. (subsequent to the expiration of the 28 days,) the lessor of the plaintiff demised to the plaintiff; That, by virtue of such demise, he entered, &c.

1780.

GOODRIGHT
against
CATOR,

This special verdict was argued, on *Tuesday*, the 21st of November, by *Morgan*, for the plaintiff, and *Rous*, for the defendant.

[482]

Morgan said, he supposed it would be contended, on the other side, — 1. That the revocation of the uses of the release of 1765, by that of the 20th of October 1773, had made void the demise to the lessor of the plaintiff. In answer to this, it ought to be considered, what the powers incident to a tenant for life are, and how far those powers were restrained, or narrowed, in this particular instance, by any thing contained in the release of 1765. The special verdict expressly finds, that Lord *Bolingbroke* was tenant for life. Now, that a tenant for life may grant any interest for years determinable with his own life, without incurring a forfeiture, is clearly settled by the authorities cited in 2 *Bacon's Abr.* 279. viz. 8 Co. 45. and Co. Litt. 233. Then, as to the effect of the leasing power, and of the power of revocation, in the release of 1765; the first can only regard such acts as Lord *Bolingbroke* was thereby authorized to do, which might affect the interest of those in remainder, after the determination of his estate for life. To have restrained him in that respect, would have been repugnant to the very nature of the interest granted to him. But the demise to Mrs. *Hare* was not an act which could affect the reversion; and it hath nothing whatever to do with the leasing power, nor was it all necessary

VOL. II.

F

that

1786.

GOODRIGHT
against
CATOR.

[483]

that it should be made under any of the restrictions required thereby. With respect to the power of revocation in the release of 1763, *that* could only extend to such estates as should exist in Lord *Bolingbroke*, and the trustees, at the time of executing the deed of revocation. It could not possibly enable the tenant for life to annul acts done by himself, and which, under that very deed which created the power of revocation, he had a power to do. Besides, it does not appear that Mrs. *Hare* was acquainted with the power of revocation, and, therefore, she is to be considered as a purchaser for valuable consideration, without notice. The defendant, on the contrary, bought the estate with full knowledge of this incumbrance, and, therefore, took it subject to the charge.—But, 1. It will be contended, that this is an action brought by the lessor of the plaintiff, as *landlord*, against the defendant, as *tenant*, and that the circumstances are not such as entitle her, under the statute of 4 Geo. 2. c. 28 § 2. to bring an ejectment, *without re-entry or demand*. But it must be considered, that an entry by the plaintiff is found by the *verdict*, and indeed the defendant could not have obtained a special verdict, without confessing lease, entry, and ouster. As to *actual* entry, it has been solemnly determined in the Common Pleas, while WILLES, *Chief Justice*, presided in that court, that it is only necessary in the single case of avoiding a fine [1].

Rous, for the defendant,—1. Denied that any such general rule had been laid down as had been just mentioned. He contended, that it was clear, from the wording of the statute of 4 Geo. 2. c. 28. § 2. that *demand*, and *actual* re-entry, in all cases between landlord and tenant, are only to be dispensed with, where there is *half* a year's rent in arrear, and no sufficient distress to be found on the premises. Here only a *quarter's* rent is stated to have been in arrear, and, as it is not found that there was not sufficient distress, the court according to all the rules of construing special verdicts, must imply that there was —2. It is clear that Mrs. *Hare* knew Lord *Bolingbroke* was only tenant for life, as she took her annuity for *his* life, not for her own. It must, therefore, be presumed, that she had recourse to the settlement creating his estate for life, and, if so, she must have known of the power of revocation, and therefore took the conveyance, knowing, if he should execute the power, that she would be reduced to the security of his bond. It is true, *Cator* was acquainted with the conveyance to Mrs. *Hare*, but, as he was advised that it did not bind the estate after the revocation, and he gave the full value, his conscience

[1] The case here alluded to, the name of which was not recollected, at the time, by any one at the bar, seems to be that of *Jenkin v. Brichard*, C. B. M. 30 Geo. 2. cited in *Law of N. Pr.* ed. 1775, p. 103.

science is not affected. If he had looked to the value of her incumbrance, which is stated to be 3000*l.* and had deducted that from the full price, it would have been a fraud upon the trustees. At any rate, how far he shall be affected by the notice of Mrs. Hare's grant, is for the consideration of a court of equity. The legal estate must depend on the construction of the settlement of 1765. A tenant for life who has only a qualified or defeasible interest, cannot alien the estate, for his own life, discharged from the qualifications which affected it in his hand; and Lord Bolingbroke's estate for life was qualified, and subject to the operations and consequences of the power of revocation. The interest of the trustees, and all the clauses and powers of the settlement, having been created in consequence of a marriage contract, were for valuable consideration. In the power of revocation, the only exception is with regard to leases made pursuant to the leasing power. Is it not, therefore, the obvious construction, that all other incumbrances, not made pursuant to that power, were to be affected by the revocation?

Morgan, in reply, observed, that this action was brought *in the express contract* between the parties, by which Mrs. Hare was entitled to enter, if any payment should be in arrear for 28 days, *not under the statute of Geo. 2.* As to the other point, he said that the demise by Lord Bolingbroke to Mrs. Hare ought to be considered as a relinquishment, *pro tanto*, of his power of revocation; and it would be a gross absurdity, if, after he had received 3000*l.* on the security of his life estate, he could re-instate himself by an act of his own, and entirely relieve the estate from that incumbrance.

LORD MANSFIELD, — The defendant in this cause had turned the lessor of the plaintiff twice round, upon former occasions, by objections in point of form [1]. It would be very unfortunate, if he were to succeed a third time in a similar attempt. — As to the second point, was an actual entry necessary in this case? I have always taken the distinction to be, that, where entry is necessary to complete the landlord's title, (as when a power to re-enter is reserved

F 2

10

[1] The lessor of the plaintiff had first brought covenant against the defendant, as assignee of the estate, right, title, &c. granted by her to Lord Bolingbroke; the defendant pleaded, that the estate, right, title, &c. of Lord Bolingbroke, in the premises demised by her to Lord Bolingbroke, did not come to him by assignment: And on the trial it appeared that, besides the estate in Kent, Lord Bolingbroke had demised to her, and that she had re-de-

mised, a farm in Surry, which farm was not sold to the defendant; and a case being reserved, and the question argued, (as stated *supra*, p. 184. Note [21].) it was held, that he could not be sued as assignee. Afterwards, an ejectment was brought, but the lessor of the plaintiff having neglected to inroll the annuity, according to 17 Geo. 3. c. 26. she was nonsuited also in that action.

1780.

GOODRIGHT
against
CATOR.

[484]

1780.

GOODRIGHT
against
CATOR.

[485]

to him in case of non-payment of rent,) there, the confession of lease, entry, and ouster, is sufficient; but that where it is requisite in order to *rebut the defendant's title*, actual entry must be made. This is the case when a fine is to be avoided. In the case of *Dormer v. Portescue*, which was much argued, both here, and in the House of Lords (a), I find the counsel could not state another instance, where actual entry must be made. The clause of the statute of *Geo. 2.* is very confused, but I think it meant only to provide a remedy in cases of vacant possession, although other matters are thrown in. My present opinion is, that actual entry was not necessary in this case. That, surely, could never be the intention of the parties, where the right of re-entry is expressly reserved, if a quarter's rent shall be in arrear for 28 days.—With regard to the first point, I cannot frame a doubt upon it. Undoubtedly Lord *Bolingbroke* had a right to do what he did. It is a right which arises out of the nature of his estate. The question is, Whether the same Lord *Bolingbroke* who has made this demise, for a valuable consideration, can be authorized to revoke it under any power in any settlement? for, by the power, the revocation must be executed by him. There is a gross fraud attempted, in this case, either upon *Cator*, or on *Mrs. Hare*. If *Cator* did not know of the incumbrance, there was a fraud upon him. But it is found that he knew of it; and therefore, the fraud was upon *Mrs. Hare*.—If the defendant's counsel can find any case of this sort, where actual entry has been held necessary, let them mention it to the court.

WILLES, Justice, of the same opinion.

ASHHURST, Justice, of the same opinion. He recollected the case in *C. B.* alluded to by *Morgan*, and also a case of *Astlin v. Perkins*, in this court, to the same effect.

BULLER, Justice,—I am entirely of the same opinion, as to the question on the effect of the revocation. With regard to the other, I think it proper it should be enquired into.

This day, Lord MANSFIELD, delivered the ultimate opinion of the court, as follows:

LORD MANSFIELD,—We have looked very particularly into the cases for two hundred years back, and we find a great deal of contrariety on the question, whether an actual entry is necessary, in order to maintain an ejectment, on a clause of re-entry, for non-payment of rent: but, in the most distant period, the better opinion has been, that it is not. This was Lord HALE's opinion, and is mentioned as such, and as that of Lord Chief Justice SCROGGS, by Lord HOLT,

(a) Law of N. Pr. ed. 1775, p. 104. Geo. 2. 2 Str. 1086. & Andr. 125. *Berrington v. Parkhurst*, B. R. H. 11

HOLT, in the case of *Little v. Heaton* (a). But we look upon it as having been fully settled, in 1703, by the opinion of all the judges, upon deliberation and consideration of all the cases, that actual entry is only necessary to avoid a fine [1]; * and so the practice has been ever since. The reason of the thing is agreeable to the practice, for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service. In the case of fines it is required by a positive rule of law, and clearly necessary under the statute of 4 *Anne*, c. 16 (b). I have a string of all the cases on this subject, but it would be very unentertaining and unnecessary to state them. Mr. *Rous* also contended, that a demand of the rent was necessary. There seemed to be some weight in that point, upon the reason of the thing; and, on looking into the cases, it appears, to have a foundation in authority (c). But, here, by the express terms of the lease, the demand is dispensed with. The act of 4 *Geo.* 2. is very perplexed; but the meaning certainly only is, that, where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six months rent is in arrear, and there is not a sufficient distress; otherwise, in such cases, you must make a demand.

1780.

GOODRIGHT
against
CATOR.

* [486]

Judgment for the plaintiff.

(a) 1 *An. N. Pr.* 2 *Ld. Raym.* 750.
1 *Salk.* 259. *S. C. Holt.* 264.

[1] *Qu.* If actual entry is not also necessary, in order to prevent the operation of the statute of limitations, 21 *Jac.* 1. c. 16. *Vide Law of N. Pr. ed.* 1775, p. 192. ✱ So held on a trial at bar in *Ford v. Grey*, *B. R. H.* 2 *Anne*, "unless there be some special reason to the contrary." 1 *Salk.* 285. Actual entry is also necessary, in order to enable a person who has recovered in

ejectment, to maintain trespass for the mesne profits against one who was occupier when the title accrued, but not at the time of the ejectment. *Law of N. Pr. ed.* 1775, p. 87.

(b) § 16. (c) 2 *Ld. Raym.* 751. in *Marg.* ✱ *Vide*, also, *Cro. El.* 15. where it is said to have been held, that in the case of land, the demand must be on the most notorious place of the land, and, of a house, in the house.

The KING against READ.

Wednesday,
22d Nov.

RULE to shew cause, why this and five other convictions upon the mutiny act (d), for not quartering officers, should not be quashed. The objection was, that the evidence was not set forth. The conviction ran thus: "Whereupon, witnesses being examined on oath, and the said *William Read* having neglected, or refused, to attend,

A conviction by a justice of peace is bad, unless it set forth the evidence.

(d) § 71.

1780.

The King
against
READ.

[487]

"tend, after being duly summoned, to answer such complaints and informations, and having duly considered on the evidences, I the said *Edward Dyne* am of opinion, that the said *William Read* did refuse to find such proper quarters for the said *Thomas Davis*, as by the said act are directed to be found; and I do, accordingly, adjudge and convict, &c."

Peckham, in support of the conviction, insisted, that the fact was sufficiently stated to shew on what ground the magistrate supported his judgment.

B. Hunter was on the other side: but the court, without hearing him, said, the question was not open, and that the conviction could not be supported [1].

The conviction quashed.

[1] *Vide Rex v. Theod. M. 5 Geo. 2. 4 Burr. 2063. Rex v. Bryan, H. 2 Str. 915, Rex. v. Killet, E. 7 Geo. 3. 11 Geo. 2. Andr. 81.*

Wednesday,
22d Nov.

DOE, Lessee of FONNEREAU, against
FONNEREAU.

An estate to *A.* for life in a deed, and a limitation of the same estate to the heirs of *A.* in a will, (though the estate by the deed was voluntary, and moved from the testator, and is recited in the will,) do not unite so as to give *A.* an estate-tail, but the heirs of his body take by purchase.— A devise of a real estate to *B.* after a good executory devise thereof to the heirs male of the body of *A.* from and after the decease of *A.* and limited on default of such issue, is a good

executory devise; vesting, either in possession, or on the death of *A.* without leaving issue male, or as a remainder after an estate-tail, on his death leaving issue male.

UPON a special verdict, in an action of ejectment which was tried before Lord MANSFIELD, at the Sittings for *Middlesex*, after *Easter Term*, 19 Geo. 3. the facts were: That *Claude Fonnereau*, being seised in fee, by indenture, bearing date the 1st of April 1735, and made between him and his eldest son *Thomas Fonnereau*, in consideration of natural love and affection, did give and grant to the said *Thomas Fonnereau*, and his assigns, the estate in question, to hold the same to him, and his assigns, from *Michaelmas* then last past, for life, without impeachment of waste, at the rent of a pepper-corn, if demanded: that *Thomas*, the son, entered, and was seised in his demesne as of freehold, for life, the reversion in fee remaining in the father; and that the father, on the 27th of June 1738, devised the said reversion in the words following:—"Whereas I have settled my estate, called *Christ Church*, at *Ipswich*, in *Suffolk*, (the lands in question,) upon my eldest son *Thomas Fonnereau*, for the term of his natural life; my will is, and I do hereby, from and after his decease, give and devise the same to the heirs male of his body begotten in lawful marriage, and, in default of such issue, to the use and behoof of my second, third, fourth, and fifth sons, severally, successively, and in remainder, one after another, as they every of them are in priority of birth, and seniority of age, and of the several heirs male begotten in lawful marriage, of the body and bodies of my said sons respectively

issuing.

"*issuing, the elder of my said sons, and the heirs male of his body, to be always preferred, and to take, before the younger of my said sons, and the heirs male of their bodies; * and, for want of such issue, to my right heirs:*" that the testator, afterwards, on the 5th of April 1740, died, seised of the reversion, leaving the said *Thomas Fomereau* his eldest son, *Claudius Fomereau*, (the lessor of the plaintiff,) his second son, and three other sons: that, after the death of the testator, his eldest son *Thomas*, being seised of the premises as the law requires, covenanted to levy a fine, for the purpose of making a tenant to the *precipe*, which he afterwards did, and suffered a recovery, to the use of himself in fee: that afterwards, on the 6th of January 1779, *Thomas* devised to the use of his nephew *Martin Fomereau*, (the defendant,) for life, with divers remainders over: that *Thomas*, soon after making his will, died seised, without leaving, or ever having had, any lawful issue whatsoever, and without having ever been married: that the lessor of the plaintiff, in 1779, made an actual entry into the premises, for the purpose of avoiding the fine levied by his brother *Thomas*.

1780.

Doe
against

FOMEREAU.

* [488]

The case was argued, in *Trinity Term*, 19 Geo. 3. (a), by *Rooke* for the plaintiff, and *Wilson* for the defendant; and again, in *Hilary Term*, 20 Geo. 3. (b) by *Hill*, Serjeant, for the plaintiff, and *Dunning* for the defendant; and, in *Easter Term* following (c), LORD MANSFIELD delivered the opinion of the court, in favour of the defendant. A few days afterwards, however (d), his Lordship directed, that the judgment should be stopped, and the case argued again in the ensuing term. Accordingly, there was a third argument in *Trinity Term*, 20 Geo. 3. (e), by the *Solicitor General* for the plaintiff, and *Grose*, Serjeant, for the defendant; after which, the case stood over till this day, when judgment was given for the plaintiff.

There were two general questions in the case; 1. Supposing the limitations over to the *second*, and other sons, to have been good in their creation, whether they were not barred and destroyed by the recovery? 2. Whether those limitations were not void from the beginning?

If *Thomas*, the son, took an estate-tail, it was clear that the limitations over were barred, and the title of the lessor of the plaintiff destroyed. But such an estate-tail could only have vested in *Thomas*; either, 1. by coupling the estate for life, settled upon him by the deed set forth in the special verdict, with the limitations to his heirs male in the will, so as to bring this within the rule in *Shelley's Case* (f), or, 2. by

[489]

F 4

construing

(a) Friday, 18 June 1779.

(b) Tuesday, 8 February 1780.

(c) Friday, 14 April 1780.

(d) Tuesday, 18 April 1780.

(e) Tuesday, 30 May 1780.

(f) C. B. T. 23 El. 1 Co. 93. b. 304. a. 106. b.

1780,

Dox
against
FONNELLAV.

construing him to have taken such estate-tail under the will. If *Thomas* took only an estate for life, then the recovery could not bar the limitations to the second and other sons, if they were good in their creation; and therefore, on this supposition, it was necessary for the defendant to insist, that those limitations were executory devises, and void, as being limited on too remote a contingency. In consequence of these different views of the case, there were four different heads of argument insisted upon by the counsel for the plaintiff.

1. They contended, that the limitations to *Thomas* in the deed, and to his issue-male in the will, could not be coupled, so as to make the words of the latter words of descent, and to vest an estate-tail in him.

2. That an estate-tail to *Thomas* could not be raised from the words of the will.

3. That the limitation to the second son, was an immediate devise of the reversion after *Thomas*'s life, by which an estate-tail in that reversion vested in the second son *Clodius*, (the lessor of the plaintiff,) immediately on the testator's death, with successive vested remainders over to the other younger sons.

4. Or, if it should be held that the successive devises to the younger sons were all future and executory, then, that they were not within the reason and principle upon which executory devises had been held void as being too remote.

On these four heads the substance of the arguments for the plaintiff was as follows.

1. The rule in *Shelley's Case*, only applies where the first and subsequent limitations are in the same instrument. The words are; "When the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee, or in tail, that always, in such cases, 'the heirs' are words of limitation of the estate, and not words of purchase (a)." The court now, (when the feudal reasons for which it was introduced have ceased,) will not be inclined to extend the rule; as it tends, in most instances, rather to defeat than give effect to the real intention of the testator: and, though some authorities may be mentioned where it has been, perhaps, carried farther in some respects than the words above cited import, yet, upon a review of all the cases on the subject, so far from their being any decision to warrant the application of it to the case of limitations into two different conveyances, it will be found that the contrary has been determined. In the first *Institute* (b) Lord Coke expresses himself thus: "If a man seised in fee, make a feoffment in fee, (and depart with his whole estate,) and limit the use to his daughter, for life, and, after her decease, to the use of his son, in tail, and, after, to

[490]

(a) 1 Co. 104. a.

(b) Co. Litt. 22. b.

1780.

Doe
against
Fornall & Co.

"the use of the right heirs of the feoffor; in this case,
 "albeit, he departed with the whole fee-simple by the
 "feoffment, and limited no use to himself, yet hath he a
 "reversion, for whensoever the ancestor takes an estate
 "for life, and after, a limitation is made to his right heirs,
 "the right heirs shall not be purchasers; and here in this
 "case, when the limitation is to his right heirs, and right
 "heirs he cannot have during his life, (for *non est hæres vi-*
ventis) the law doth create an use in him during his life,
 "until the future use cometh *in esse*, and, consequently the
 "right heirs cannot be purchasers; and no diversity when
 "the law creates the estate for life, and when the party."

This extends the rule in *Shelley's* case, to that of a *resulting*
 use for life, but still that resulting use arises upon the *same*
 conveyance which creates the limitation to the heirs. In
Pibus v. Mitford (a), a father covenanted to stand seised "to
 "the use of his heirs male, begotten or to be begotten on the
 "body of his second wife;" and there, too, it was held by
 Lord HALE, WILD, and RAINSFORD, *Justices*, against
 TWISDEN, *Justice*, that an use for life in the father arose
 by implication, which united with the express limitation
 to the heirs male by the second wife, so as to make him ten-
 ant in special tail; but still, this implication arose upon
 the same conveyance which created the express limitation.
 In *Goodman v. Goodright* (b), it is manifest, from the rea-
 soning, both of the counsel and the court, (although there
 was no express opinion given,) that it was not thought the
 estate given to the niece, by the articles, could unite with
 the limitation to the heirs of her body by another husband,
 in the will. These authorities, therefore, (which may per-
 haps be cited on the other side,) do not carry the rule to the
 case of two different conveyances; nor can any positive de-
 cision be found that does. The only instance of a doubt
 having been entertained, was by Lord Keeper Wright, in
 the case of *Clifton v. Jackson*, (c), who is stated to have said,
 that "all the authorities are only in the affirmative; that,
 "if by the same deed, they shall consolidate; not nega-
 "tively; that, if by different deeds they shall not." But
 there was no determination in that case; and he was clear-
 ly mistaken as to the authorities. In *Cranmer's Case* (d), DY-
 ER, Chief Justice, expressly says, that, "if a lease is made to
 A for life, the remainder to the right heirs of B, and
 B purchaseth the estate of A, the estate in remainder is
 not executed, for it is not conveyed by the grant of the first
 grantor, but by the act of another person after the grant."
 So, in *Snow v. Cutler* (e), a husband and wife being seised
 of a copyhold estate, to them and the heirs of the husband,
 the husband surrendered to the use of his will, and after-
 wards devised to the heirs of the body of the wife, if they
 should

[491]

(a) B. R. T. 36 Car. 2. 1 Ventr. 372;

(b) M. 33 Geo. 2. 2 Bur. 873. Vide

(c) Canc. H. 1704. 2 Vern. 486.

(d) C. B. 16 Elis. 2 Leon. 5. 7.

(e) B. R. T. 16 Car. 2. 1 Lev. 135, 136.

1780.

Does
against
FORNELLAU.

[492]

should attain 14 years, and, though the court differed on some of the points in the case, and did not give judgment, yet they all agreed that the devise to the heirs of the body of the wife, was not a remainder to her, but an executory devise, "for although the wife had an estate for her life, yet this is a new devise, to take place after her death, and is not a remainder joined to her estate." And, again, in *Moore v. Parker* (a), *A* having issue *B* his son, settled lands, on the marriage of *B*, to the use of *B* for life, remainder to the wife of *B* for life, remainder to the first and other sons in tail, with reversion to himself in fee. Afterwards, *A* devised the same lands, to such issue-male as *B* should have by any other wife, in tail-male, and, in case of failure of issue-male in *B*, to his grand-children by his daughter *C*, in fee. *B* suffered a recovery, and died without issue-male. *HOLT*, Chief Justice, doubted as to the reversion devised to the grand-children, because there was a prior devise, to persons not in esse, per verba de presenti; but he was clear that the devise to *B*'s issue-male, by any other wife, could not be tacked to the estate for life, because that was limited by another conveyance; and, in this, all the other judges concurred [1]. Lastly, in *Hopkins v. Hopkins* (b), Lord *HARDWICKE*, in citing *Pibus v. Milford*, seems clearly to have thought that the rule ought not to be carried farther than it had been in that case (c).

2. It will be impossible for the defendant's counsel to maintain, that *Thomas* took an estate-tail by the will. In the first place, he certainly did not take such estate by express devise. If the testator had, in words, devised to him the life-estate, which he had already by the deed, that devise could have had no effect; but there is no attempt of that sort in the will, which only takes notice of the life-estate which *Thomas* already had, by way of recital; and, that a mere recital will not amount to a devise, has been often determined, particularly in *Wright v. Wyvill* (d), and *Right v. Hammond* (e). In the second place, it will not be possible to raise an estate-tail to *Thomas* by implication. On this point, the case of *Laneborough v. Fox* (f), was not stronger than this. There, Lord *Laneborough*, having the reversion in fee, of lands settled upon the marriage of his son *James Lane* in strict settlement, devised all the lands in that settlement, (to which the will referred,) "on failure of issue of the body of *James Lane*, and for want of the heirs male of my body," to his daughter *Frances*, in tail.

(a) B. R. E. 7 Will. 3. 1 Ld. Raym. 37. 4 Mod. 316. Skinn. 558.

[1] *Holt* cited, for this, a case in 29 Ed. 3 exactly similar to that put by *Dyer* in *Cranmer's Case* above-mentioned.

(b) *Canc.* 1738. 1 Atk. 581.

(c) *Ibid.* 596.

(d) C. B. T. 1 W. & M. 2 Vent. 56. 7.

(e) B. R. E. 7 Geo. 1. 1 Str. 417. 429. S. C. Com. 232.

(f) Dom. Proc. On Error from *Cambridge* in *Ireland*, 6 Geo. 3. C. Temp. Talb. 262.

tail, with remainders over; and it was adjudged, in the House of Lords, upon the opinion of all the judges, that *James* did not take any estate-tail by implication [1780]. Such an implication is never made unless in order to effectuate the intention of the testator. It will be contended, perhaps, that *Claude Fonnereau* must have intended to give to his son *Thomas*, as large an estate as to his other sons, and that, as the limitations to the second, and other sons, are estates-tail, the will ought to be so construed as to give the same estate to the eldest. But the truth is, that, though, in words, he has given estates-tail to his younger sons, he certainly did not mean that the second should be able to defeat the limitations over to those in succession after him, &c. nor, of course, that *Thomas* should be able to destroy that to the second.

1780.

Doct
against
FONNEREAU.

[493]

3. If the eldest son had not such an estate as enabled him to suffer a valid recovery, nothing done by him has divested any right which the second son had under the will, and, therefore, it remains to see whether the devise over to the second, and other sons, is capable of such a construction, as to be good and effectual, without contradicting any rule of law. The affirmative of this may be maintained in two ways. In the first place, the will may be so construed as to give the second son an immediate estate, in the reversion expectant on the death of *Thomas*, subject to open and let in the devise to the heirs-male of *Thomas*, if, and when, any person should happen to answer that description. This construction may be supported on the authority of *Uvedall v. Uvedall* (a), where, there being a feoffment to the use of *A* for life, remainder to the use of his first and other sons, in tail-male, remainder to the use of *B* for life, remainder to his first and other sons in tail-male, and *A* having no son, and *B* having one, who cut down timber trees, and it was held, that *B*'s son might maintain *traverse* for the trees, as having the immediate inheritance at the time that they were cut down, and the remainder to the first and other sons of *A* was no impediment, being but a possibility, which might never happen. According to a notion which long prevailed, an estate given *per verba de presenti*, to persons not in esse at the time of the testator's death, (as here to the heirs of the body of *Thomas*,) was void; but even then, it was held that the limitation over was not also void, but vested immediately, in the same manner as if there had been no such preceding devise; 2 *Ralle's Abridgment*, title *Remainder* (b),

Scolastica's

[1780] *S. P. Letheullier v. Tracey*.*A. pl. 3. Alleyne 81.*1754. 3 *Atk.* 793. 796. 797.(b) *P.* 425. (c) 7. *Cites 9 H. 6.*

220. 224.

24. 6.

(d) *B. R. M.* 24 *Car. 1.* 2 *Rall.* 119.

1780.

Doe
against
FOMNEREAU.

[494]

Scolastica's Case (b), *Avelyn v. Ward* (c), *Andrews v. Fulham* (d), *Goodright v. Cornish* (e), *Scattergood v. Edge* (f). This distinction, indeed, has been over-ruled in later cases, and it has been held that, in whatever words the devise is, yet, if it be clear, from the subject-matter, that the testator meant it to be future, it shall enure in that manner, and not be void, though the devisee is not *in esse* at the time of the testator's death; *Harris v. Barnes* (g), *Doe v. Carleton* (h) [1].

4. [2]. The devise to the second son, (if not immediate,) may be considered either—*First*, as an executory limitation upon the alternative of one of two events, (which alternative is quaintly termed a *contingency with a double aspect*,) viz. either the event of *Thomas* leaving issue male of his body, or, that of his dying without leaving issue male, (which is what, in truth, has happened;) and on this last event happening, it would actually vest in possession, long within the time allowed by law, namely, immediately on the death of a person *in esse*:—or, *secondly*, independent of that ground, as such an executory devise, as, in all events, and whichever of the two contingencies should happen, could not tie up the estate from alienation beyond 21 years after the death of a person *in esse*, and therefore, not within the principle of the rule, making devises on the indefinite failure of issue void as being too remote.—*First*, As to the implied double contingency, cases of that sort have been often determined on personal property, and the devise over supported, when the second of the two events took place (i); and there is no sound reason, why a like implication should not be made in devises of land, so as to support the intention of the testator. Indeed, it has been so held by this court in a late case, viz. *Baldwin v. Karver* (k), which was sent from

(b) C. B. M. 13 & 14 El. Plowd. 403. 414.

(c) Canc. 1749. 1 Vez 420.

(d) B. R. T. 11 & 12 Geo. 2. Andr. 263. 269.

(e) B. R. H. 5 W. & M. 1 Salk. 226. 1 Ld. Raym. 3.

(f) C. B. T. 9 Will. 3. 1 Salk. 229. S. C. 12 Mod. 278; and now, in Supplement to Ed. of 1781, of 11 Mod. 277.

(g) B. R. H. 8 Geo. 3. 4 Burr. 2157. Since reported, 1 Blackst. 643.

(h) C. B. T. 21 & 22 Geo. 2. 1 Willf. 225.

[1] *Roake* cited *Pay's Case*, reported Cro. Eliz. 878. and mentioned in *Hopkins v. Hopkins*, Ca. Temp. Talb. 48. to shew, that the nature of a devise

may vary, so as to be construed a remainder, or executory devise, as will best support the intention, according to circumstances. But Lord Mansfield told him, that proposition had been exploded, and that it is settled that a will must always be construed to take effect at the instant of the testator's death.

[2] Lord Mansfield said *Roake*, on the first argument, that the whole point seemed to him to be, whether they could make the estate to the second son good, on the ground of implied double contingency.

(i) *Stanley v. Leigh*, Canc. M. 172. 2 P. Will. 686, &c.

(k) *Vide infra*, p. 503. Note [1].

the court of *Chancery*, and in which both real and personal property were held to pass to the devisees, after an executory devise to the heirs of the body of *A*, such heirs never having come *in esse*.—But, *secondly*, as to the other ground, and supposing no such double contingency to be implied as having been in the contemplation of the testator, what is to hinder this to be supported as a good executory devise? The only objection to the validity of such a devise is, the possibility of its not vesting within the time required by law to prevent perpetuities. If that objection does not lie, it will be maintained, though against the other rules of law. Thus, by way of executory devise, a fee may be limited on a fee (*a*); a contingent estate may be created, without a previous freehold interest to support it; a term may be given to one for life, with limitations over, &c. But it will be said to be part of the rule, as to the time when an executory devise can vest, that, if it is limited after an indefinite failure of issue, *that* is too remote, and that, here, the limitation to the second son, (if the implied double contingency shall be rejected,) is after an indefinite failure of the issue-male of *Thomas*. But, when the principle on which this rule is founded is examined, it will be found not to apply to the present case. Every estate created by way of remainder, may be destroyed, and the estate aliened, twenty-one years, (or a few months more (*b*), after the death of the person *in esse*, at the time of its creation; for if the remainder is to the unborn son of *A*, in tail, (and none more remote can be limited,) and the particular estate is limited for life, either 1. to *A*, or 2. to *B*, the remainder must vest in interest, as soon as a son is born to *A*; and, if we suppose that son to be posthumous, still he will come of age twenty-one years and a few months after the death of his father, and then by himself, (if his father was the particular tenant, or if *B* was, and is dead,) or by joining with *B*, (if *B* was the particular tenant, and is then alive,) he may suffer a recovery, destroy all subsequent limitations, and alien the estate. As an executory devise cannot be barred by a recovery, or any other act of the person previously entitled to the estate (*c*), after their general validity came to be allowed, the courts were anxious to restrain them, so as not to create perpetuities, or tie property up longer than it can be done by way of remainder; and therefore, if they are limited so as not possibly to take effect till more than twenty-one years and a few months after the death of a person *in esse*, they are held to be void. Thus an executory devise, to take effect,

1780.

DOE
against
PONNEREAU.

[495]

(a) *Pells v. Brown*, B. R. M. 18 child, by 10 & 11 Will. 3. c. 16.
Jac. 1. Cro. Jac. 590.

(c) B. R. M. 18 Jac. 1. *Pells v.*

(b) In the case of a posthumous *Brown*, Cro. Jac. 590.

1780.

DOE
against
FOWNEHEAD.
* [496]

effect after an unborn son of *A* should attain his age of twenty-five, would be void, as being too remote, and, *a fortiori*, if it were not to take effect *till an indefinite failure of the issue of *A*, they not having any previous estate in the land. If the first limitation is an executory devise, then all that follow are. Therefore, on the supposition, that, here, the devise to the heirs of the body of *Thomas* was future and executory, those to the second, and other sons, also were. But it is settled, that, whenever the first limitation, in such case, vests in possession, those that follow vest in interest at the same time, and therefore cease to be executory, and become mere vested remainders, and subject to all the incidents of that sort of estate (a). If, therefore, the estate to the heirs male of *Thomas* had vested, by his leaving male-issue, which it must have done, if at all, at his death, or in a few months after it, then the limitations over would have become vested remainders. On this supposition, as soon as the son of *Thomas* came of age, he might have suffered a recovery to bar the subsequent estates to the second and other sons. The only other possible event is that which has happened, viz. the death of *Thomas* without leaving male issue. In that case, the estate in the second son, vests in possession immediately, and, therefore, either way, the land could not be fettered beyond twenty-one years and a few months after the life of a person *in esse*. This being the case, the limitation to the second son, cannot be considered, on any supposition, as too remote.—*Doe v. Carlton* (b), *Harris v. Barnes* (c), *Goodright v. Cornish* (d), *Gore v. Gore* (e), *Hopkins v. Hopkins* (f), and *Brownsword v. Edwards* (g), were cited, as establishing the principles and reasoning on this head; but, particularly, the case of *Stephens v. Stephens* (h) was, on the second and third argument, insisted on, as directly in point.

The counsel for the defendant argued, on the different heads, to the following effect.

1. The primary intention of the testator manifestly must have been to give *Thomas* an estate-tail; for there can be no reason to suppose, that he meant to limit a different, or better, interest, to his younger sons, than to him; *King v. Melling* (i). The court, therefore, will do every thing in their power, consistent with the rules of law, to give effect to that intention. Now, it has never

(a) *Stephens v. Stephens*, *Hopkins v. Hopkins*, &c.

(b) *C. B. T.* 21 & 22 *Geo.* 2. 1748.

1 *Will.* 225. and cited 4 *Burr.* 2160.

(c) *B. R. H.* 8 *Geo.* 3. 4 *Burr.* 2157.

(d) 1 *Salk.* 226.

(e) *Canc. T.* 1722. 2 *P. Will.* 28.

(f) *Canc. M.* 1734. *Ca. Temp. Talb.*

44.

(g) *Canc.* 1751. 2 *Vez.* 243. 249.

(h) *Canc.* 1736. *Ca. Temp. Talb.* 228.

(i) *B. R. M.* 24 *Car.* 2. 1 *Ventr.* 225. 2 *Lov.* 58.

yet been determined, that two estates in the same land, though by different conveyances, given to the same person, both voluntary, and both flowing from the same person, shall not unite. Though not within the exact words, such a case is clearly within the principle of the rule in *Shelley's Case*. Here, the deed was voluntary; it might have been defeated by the father; and he considered himself as confirming it, and giving the same estate again by his will. To consider the deed, and the will, as the same conveyance, would only be analogous to what the law does in other instances; as of powers, and the execution of those powers, fines or recoveries, and deeds to declare or lead the uses, &c. None of the cases cited to shew, that the two limitations cannot unite, amount to any thing like an authority or decision, applicable here. The case mentioned by *Dyer*, in *Cranmer's Case*, differed materially from this; for there, the limitation for life came to *B*, after the creation of *that* to his right heirs, and they came from different persons. *Snowe v. Cutler* was never decided; and there, too, the two estates came from different persons [1]. In *Moore v. Parker*, there was no determination; but, there, the limitation to the first and other sons of *B*, shewed that it could not be intended that he should take an estate tail; and if both, in that case, had been limited by the same conveyance, they could not have been consolidated. The point is clearly considered by the court, in *Goodman v. Goodright* (a) as then undetermined; and it certainly has not been decided since that case.

2. To raise an estate-tail in *Thomas*, upon the words of the will itself, will be most consonant to the intention of the testator, for he certainly must have meant that all the sons of *Thomas* should be capable of taking; yet, if *Thomas* had left several sons, according to the construction contended for on the part of the plaintiff, and estate-tail would have vested in the eldest, on the father's death, and then the others would have been totally excluded, though the issue of the eldest should afterwards have failed. Those words, therefore, consistently with the intention of the testator, cannot be construed to limit an estate-tail, by purchase, to the sons of *Thomas*; and, if it appear to the court, that he must have meant to give such estate to *Thomas* himself, they will give effect to that intention, if they can, either upon the express words, or by legal implication. Now there seem to be express words sufficient for that purpose. Consider the whole devise together as one sentence. After mentioning *Thomas*, the eldest son, and then the second, third, fourth, and fifth the testator adds, *The elder of my said sons, and the heirs* male

1780.

Do
against
FONNERRAT.

[498]

[1] It does not appear, from the report of the case, whether they did, or did not. (a) 2 Burr. 878.

1780.

Doz
against
FONNESBURY.

male of his body, to be always preferred, and to take before the younger of my said sons and the heirs male of their bodies. Does it not seem clear, that *Thomas* was here meant by "the elder of my laid sons," and that an immediate estate-tail in the reversion was thereby expressly limited to him? But, if there were no express words, still, if there is a fair ground for implying an estate-tail, the court will do it, to promote, though never to defeat, the intention of a testator. Instances of such implied devises are very ancient. There is one of an estate for life, in the Year-book of *Hery* 7. where the devise was, "all my goods to my wife, and after my wife's death, my son and heir shall have the house; and, (says the book,) although there was no devise of the house made to the wife, by express words, (but only by implication, because the heir was not to have it during the life of his mother,) yet, forasmuch as it was the intent of the testator, that the son should not have it during her life, therefore the wife should have it for life;" to which all the justices agreed (a). And, in *Cozen's Case* (b), where the words were, "And if it shall please God to take my son *Richard* before he shall have issue of his body," it was held that *Richard* took an estate-tail by implication. It is impossible to believe, that the testator meant to give a different interest to *Thomas* from that limited to his younger sons; and there is no weight in the argument, that, by giving him an estate-tail, he enabled him, (by the power of suffering a recovery incident to it,) to defeat the limitations over; for that cannot be supposed to have been in the testator's contemplation, and the argument would be just as strong against the estate-tail in the first of the younger sons, he being thereby enabled to frustrate the intention as to those after him, and so on, successively, through all the rest.

[499]

3. This cannot be taken as a present devise of the reversion to the second son, subject to be divested if *Thomas* should have a son; 1. Because the second son would take by purchase, and, when that is the case, a vested estate is never divested again, by any subsequent event (1). And, 2. Because the words of this will are all future and nothing was meant to vest till after the death of *Thomas*.

(a) *H.* 13 *Hen.* 7. p. 17. pl. 22. Vide *Brooke*, tit. *Devise*. pl. 48. 52. *Plowd.* 521.

(b) *C. B.* 29 *Eliz.* *Owen* 29.

[1] *Qu.*—When an estate descends, it is often afterwards divested. Thus, when there is an executory devise, the inheritance descends to the heir, sub-

ject to be divested when the devise can take effect. So it is also settled since *Carter v. Barnard* (1 *Canc. M.* 1708. 1 *P. Will.* 505.) it descends in like manner in the case of contingent remainders; at least created by will.

4. T

1780.

Doe
against
FONNERSAUV.

4. The idea of a double contingency is contrary to the intention of the testator: for it supposes him to have meant, that if *Thomas* had no sons, his own second son should take the estate, but that he should not if *Thomas* had a son; whereas the testator certainly meant, (though his intention, as he has expressed it, was contrary to law,) that his second son should take, at all events. There is no case of a double contingency being implied, as to real property, unless where the whole fee-simple is disposed of by the first contingent limitation, so as if the first taker comes in *esse*, the whole vests in him [2]. *Baldwin v. Karver* will be found not to have turned upon a double contingency. In the present case there was but one contingency. Wills must be construed upon the circumstances as they stood at the testator's death, and cannot vary from subsequent events. What then was the limitation to the testator's second son at the time of his death? Why, a future executory devise on the general failure of issue-male of *Thomas*. That, which might not have happened for ages, is the only contingency the testator had in view; and although, in fact, *Thomas* happened to die without leaving issue-male, that circumstance, which was posterior to the death of the testator, (according to the undeniable principle just stated,) cannot alter the construction. If the contingency on which the estate to the second son was limited, had been the failure of issue of *Thomas*, at the time of his death, then the limitation would have been good. But, 1. There are no words, here, to restrain it to that period. 2. In the case of terms, such devises have been construed to be confined in that manner, when any words were used which could possibly admit of that construction; as in *Target v. Gaunt* (a), *Pinbury v. Elkin* (b), *Forth v. Chapman* (c), and *Harris v. Barnes* (d); but, in all those cases, the court have made a distinction between real estates and terms, and have held that, in cases of real estates, the same words would not restrain the time to the death of the party. This limitation therefore is void, as being too remote, and exactly within the determination in the cases of *Lanesborough v. Fox*, and *Goodman v. Goodright*. In the former, an estate being limited by deed, (after several previous limitations,) to the heirs male of the body of the testator's son *James*, and with reversion to the testator, he devised, "on failure of issue of the body of *James*, and for want of the heirs male of his own body," to his daughter *Frances*, in tail, with remainders over; and it was determined, on a writ of error from the Exchequer Chamber in

[500]

[2] As in *Luddington v. Kime*, 1. (a) *Canc. E.* 1718. 1 *P. Will.* 432.
Lord Raym. 203. *Gulliver v. Wicket*. (b) *Canc. T.* 1719. 1 *P. Will.* 563.
Wilf. 105. *Goodtitle v. Dunham*, (c) *Canc. M.* 1720. 1 *P. Will.* 663.
Idem 2. (d) *B. R. H.* 8 *Geo.* 3. 4 *Burr.* 2157.

1780.

Dox
against
FONNEREAU.

in Ireland, in the House of Lords, by the opinion of all the Judges, that the future devise, after the indefinite failure of the issue-male of the testator, was void, as being limited on too remote a contingency (c). In *Goodman v. Goodright*, the estate had been agreed to be limited by the marriage articles, to *E. W.* the testatrix's nephew in law, for life, remainder to *A. L.* her niece, (his wife,) for life, remainder to their first and other sons, successively, in tail, remainder to their first and other daughters, successively, in tail, with reversion to the testatrix, in fee. Afterwards, the testatrix, by her will—reciting that the estate was limited, or agreed to be limited, after her own death, and the death of her nephew-in-law, and niece, and, in default of issue of their two bodies, to herself in fee,—devised the inheritance to the heirs of the body of the niece *A. L.* by any other husband, and, for want of such issue, to her nephew *C. L.* and the heirs of his body, remainder over. The niece, *A. L.* and her husband *E. W.* having suffered a recovery, and having died without issue, the daughter of the nephew *C. L.* and her husband, claimed under the devise, in tail, to the nephew *C. L.* and Lord MANSFIELD, in delivering the judgment of the court, stated the single question to be, “Whether the testatrix intended to give her nephew *C. L.* and the heirs of his body, the remainder or reversion after the death of herself, and *E. W.* and *A. L.* his wife, and of the heirs of their two bodies, and also of the heirs of *A. L.*'s body by any second husband, or whether she meant to give him an estate in possession (a)?” The court held that the devise was clearly future, and that, being limited on the indefinite failure of issue of the niece *A. L.* it was too remote. This case is directly in point. The same argument which has been used on the present occasion, was applicable then; for it might have been said, that, either the niece *A. L.* must die without leaving issue, and then the nephew *C. L.*'s estate would vest at the death of a person in esse, or, if she had issue, the executory devise to the nephew *C. L.* would immediately vest as a remainder, and might be barred when the issue came of age. But either that argument was rejected by the counsel, as of no weight, or was urged without success.

In reply, on the first head, the cases of *Snowe v. Cutler*, and *Moore v. Parker*, were insisted on, as containing two successive opinions, of four Judges, that estates limited by different conveyances, cannot unite; and this without any distinction, whether moving from the same person or not.

On the second head of argument, it was observed, that the position laid down on the other side,—that, if the words “heirs-male of the body of Thomas” were construed

(c) *Ca. temp. Talb.* 268.(a) 2 *Burr.* 877.

to be words of *purchase*, then, if *Thomas* left an eldest son, and he should die without issue, no younger son of *Thomas* could take,—was only founded on a *dictum* of counsel, in *Shelley's Case*, as reported by *Coke* (b), but was not recognized by the court in that case; and that the contrary *viz.*—that in such case, the second, third, and other younger sons, would take in tail, upon the death of the first, or other elder son, without issue,—had been frequently held to be law, both before, and since; particularly in *John de Mandeville's Case* (c), in *Hodgkinson v. Wood* (d), in *Southcot v. Stawell* (e), and, very solemnly, by Lord *Macclesfield*, in *Trevor v. Trevor* (f), whose decree, in that case, was affirmed in the House of Lords. As to an implied estate-tail to *Thomas*, upon what ground could such implication be made, when he had an express provision, by the deed, which was taken notice of, and recited, in the will? Could it be seriously contended, that the will meant to pass any thing, during the life of *Thomas*, when the very beginning of the devise was, “*I devise from and after his, (Thomas's) decease?*” The subsequent words could not admit of the interpretation attempted to be put upon them. After the limitation to the heirs male of the body of *Thomas*, the devise went on to the second, third, fourth and fifth sons, successively, “*as they are in priority of birth.*” It could not be said that the word “*they*” extended to *Thomas*, and, if not, it would be impossible, by any natural construction, to carry the expression used afterwards in the same sentence—*viz.* “*the elder of my said sons*—” beyond those sons the testator was then speaking of, *that is*, his second, and other younger sons, exclusively of *Thomas*.

The *third* head, of an immediate devise to the second son, was, in a great measure, deserted, in the reply on the first, and in the course of the second, and third, arguments.

On the *fourth* head, *viz.* that the limitation was good, on an implied double contingency, or rather, (for that was the ground chiefly relied on,) that it was not, on any contingency, too remote to be supported as an executory devise, they still urged their former reasonings, 1. As to the double contingency, they observed, that, in *Harris v. Barnes*, though the first estate was a term, the limitation over was of the inheritance; and, that, in *Baldwin v. Karver*, a double contingency was implied, in respect to

1780.

Doz
against
FONNEREAU.

[502]

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real

(b) 1 Co. 104. a, b.

(c) Co. Litt. 26. b.

(d) C. B. M. 1 Car. 1 Cro. Car.

23.—*Hill, Serjeant*, observed, that, in one part of this report, *William* is printed instead of (*Qu. whether Fran-*cis or *Thomas*.)

(e) C. B. M. 28 & E. 9 Car. 2.

1 Mod. 226. 237. 2 Mod. 207.

(f) *Care T.* 1719. 1 Eq. Ca. 387.

1 F. Will. 662.

1780.

Doz
against
FONNEREAU.

real property, although the first limitation was not in fee-simple. 2. As to the limitation being too remote, they insisted on *Stephens v. Stephens*, as in point, and suggested that there must have been some omission, or mistake, in the account of the judgment of the court, in the printed report of *Goodman v. Goodright*. In the case of *Lanesborough v. Fox*, the executory devise was after an indefinite failure of the heirs-male of the testator, without any previous limitation to those heirs-male, which was clearly too remote; because, as the limitation over could never have become a vested remainder, even if the testator had had heirs-male after the issue of *James* was spent, it could not have been barred by a recovery. To make the present like that case, the devise to the heirs-male of *Thomas* must be expunged from the will, and then, it was admitted, that the devise over would be void; and if the court, in *Goodman v. Goodright*, decided, (as it is stated in some manuscript notes of the case,) that the first devise to the heirs of the body of the niece, by any second husband, was void, because limited on an indefinite failure of her issue by her then husband, there being no previous estate limited by the will, to such issue, the determination was similar to that in *Lanesborough* and *Fox*; consistent with that in *Stephens v. Stephens*; and did not at all militate against the validity of the devise over in the present case: for, if the first devise in that case was void, as being too remote, the second to the nephew, (which was that on which the question arose,) must fall to the ground of course.

[503]

After the second argument (a), Lord MANFIELD said, there was no doubt what the intention was; the only question was, if that intention could be fulfilled, consistently with the rules of law. He desired the counsel would see if they could find any cases, besides that of *Baldwin v. Karver*, where a double contingency had been implied in a case of real estate. As to *Baldwin v. Karver*, he thought the decision had not gone upon that point; and he had always considered it as the settled doctrine, since the case of *Forth v. Chapman*, that a double contingency may be implied as to personalty, but not as to real property.

A few days afterwards (b), his Lordship said, he had directed the certificate of the court, in *Baldwin v. Karver*, to be searched for, and copied. He then read it; and thereby appeared, that, although the court had suspended their opinion, and given the heir at law, and personal representative, leave to be heard by their counsel, against the validity of the devise to the grandchildren, they did not instruct counsel to object to it, and, therefore

the court avoided the question, and only gave their opinion on the point between the different grandchildren, on the supposition that the devise over was good [1].

1789,

On
Doe
against
FONNEREAU.

[1] *BALDWIN & others v. KARVER & others.*

This was a case sent, under an order of the court of Chancery, (dated 25th January 1774,) for the opinion of this court. The material part of the case was: That *Richard Ashwin*, by his will, dated the 8th of June 1756, after charging his real estate with an annuity of 80*l.* to his wife, for life, and giving her his household furniture, and 2000*l.* and 500*l.* to his nephew *John*, and several other legacies to different relations; devised his real estate, subject to the said annuity, and all the rest and residue of his personal estate, to trustees, (whom he also made his executors,) their heirs, executors, and administrators, in trust, that they should stand seised and possessed thereof, "To the use of the heirs-male of the body of my nephew *John Ashwin*, and in default of such issue-male, then to the use of the heirs-male of the body of my nephew *Richard Ashwin*, and in default of such issue-male, then to the use of all and every the grandchildren of my late brother *John Ashwin*, and the grandchildren of my late sister, *Sarah Morris*, to hold all and singular the said lands and premises, to them the said grandchildren of my said brother and sister, and their heirs, as tenants in common, and not as joint-tenants, and my said personal estate, and effects, to be equally divided amongst them share and share alike;" That, by a codicil, bearing even date with the will, and attested by the same witnesses, stating that he had omitted in the will "to dispose of the produce, interest, and increase of the surplus and remainder of his real and personal estate," he directed, that his trustees should pay "all the interest, produce, and increase that should from time to time arise, or be made,

"of his said real and personal estate, to his wife, and to his nephews, *John* and *Richard Ashwin*, share and share [504] alike, during their three natural lives, with survivorship between them;" That he made several other codicils, which did not vary or alter the will; That he died on the 6th of November 1758, leaving his nephew *John* his heir at law; and afterwards his wife died, and also the nephews, *John* and *Richard*, without issue, *Richard* having been the survivor; That, at the time of making the will, there were two grandchildren of his sister *Sarah Morris*, and six of his brother *John*, and that all the nine survived the testator; That one grandchild of the brother *John* was born after the will, and twelve more after the testator's death; and all before the death of *Richard* the nephew. The question stated by the court of Chancery was, "Whether all, or any, and which, of the grandchildren of the testator's late brother, *John Ashwin*, and of his late sister *Sarah Morris*, were intitled by the devise?" The bill was filed by the two grandchildren of the sister, born before the will, against *Karver*, the surviving trustees, and all the other grandchildren, or their representatives. The case was argued twice, first by *Dunning* for the plaintiffs, and *Mansfield* for the defendants, and afterwards by *Pepys* for the plaintiffs, and *Wallace* for the defendants. The words of the certificate were as follow:

"Having heard counsel on both sides, and considered this case, a doubt occurred, whether the devise of the real estate, as it stands upon the will alone, was good, and if it was coupled with the codicil, whether the absolute property of the personal estate would not vest in *John*, and therefore we directed notice to be given to the heir at law

1780.

DOE
against
FOSTEREAU.

On Friday, the 14th of April 1780, his Lordship having asked Hill, Serjeant, whether he had been able to find any case of real property, where the court, on the words "in default of such issue," had implied a restriction to "issue living at the death of the father," or, where a double contingency [2] had been implied, viz. to the issue, if there should be any, and, if none, to the devisee over, he said, he had not met with any; and, thereupon, his Lordship delivered the opinion of the court, to the following effect.

Lord

"law of the testator, and the personal representative or next of kin to John, that they might be heard by counsel, if they pleased. But, the cause having been postponed to this term, and no counsel appearing for them, we have thought proper to give our opinion upon the question, as between the grandchildren themselves, and, as they were all in being at the death of Richard, we think they are all equally intitled.

MANSFIELD.

R. ASTON,

E. WILLES,

W. H. ASHHURST [†107]."

June 23, 1765.

[2] A double contingency, in the sense in which the expression was used in this case, is where an estate in trust, or by way of executory devise, is so limited, that the time when it is to vest in possession, will, on one event, fall within the limits allowed by law, and, on another, will exceed them. It may be said, however, that, in many other cases of future limitations, (indeed in by far the most usual sorts of them,) there is a double contingency. Thus, suppose an estate is limited to A for life, remainder to B, in tail, remainder to C; here the time when C's estate shall vest in possession, depends on a double contingency. 1. If B die, without issue, before A, it will vest immediately on the death of A. 2. If B outlive A, it cannot vest till after the estate-tail in B is at an end.

Perhaps there may be some use in the following distribution of estates limited over after other preceding limitations. They may be divided into three classes:

1. Such as can take place in the alternative only.

2. Such as can take place in succession only.

3. Such as may take place, either in the alternative, or in succession.

1. Of the first class are all those where, if the first estate ever vest, they cannot; so that they are only good upon the alternative of the first never taking effect. This happens where there is a trust, or devise, of personal property [505] ty, to the heirs of the body, or the heirs of A, and, in default thereof, to B; as in *Higgins v. Dowler* (a), *Stanley v. Leigh* (b), &c. Or where there is, in real property, a limitation over to B, after a contingent fee-simple to A, as in *Luddington v. Kime* (c), *Doe v. Holme* (d), *Goodright v. Dunham* (e). &c. Estates of this class are often called limitations on a contingency with a double aspect; or, with less quaintness, on a double contingency. They have also been sometimes denominated concurrent, or contemporary limitations (f). But I have already remarked, that, in many of another sort, there is, as much as in these, a double contingency; and they are certainly not aptly described by the words concurrent, or contemporary

[†107] This case of *Baldwin v. Karver* has been since reported, *Cowp.* 309.

(a) *Canc. M.* 1707. 1 *P. Will.* 98.

(b) Cited *supra*, p. 494. Note (a).

(c) Cited *supra* p. 265. Note (c).

(d) Cited *ibid.* Note (d).

(e) *B. R. M.* 20 *Geo. 3. supra*, p. 264.

(f) *Supra*, p. 265. 1 *Ld. Raym.* 208.

Lord MANSFIELD, (having stated the special verdict,) — The case then lies in a very narrow compass. If the eldest son was tenant in tail, the recovery was good, and barred the limitations over; or, if limitations over were too remote, he was entitled as heir at law. As to his being tenant in tail, a considerable objection has been made, viz. that he was tenant for life under the *settlement*, not under the *will*; and several authorities have been cited to prove, that the previous and subsequent estates, when limited by different

1780.

Doz
against
FONNESBANK

contemporary. Those epithets are rather expressive of estates which take effect at one and the same time. They might, with propriety, be applied to the interests which vest in coparceners, tenants in gavel-kind, or joint-tenants; or to such remainders over as those limited, in the case of *Carter v. Barnardiston*, to *Thomas Styles* and *Sir Thomas Barnardiston*; for there, after the previous contingent fee, in the manors both of *A* and *B* to a third person, there was a limitation of the manor of *A* to the one, and of the manor of *B* to the other, to take effect at the same time.

2. The second class consists of those which can never vest, unless the preceding estate take place before them, and then not till the other is either spent, or otherwise determined. Of this sort there are examples in the cases of *Davis v. Norton* (g), and *Watson v. Shippard* (h) [† 108]. They are, however, very rare. It is certainly a general rule, "Where there is a remainder, or conditional limitation over, that, if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." Indeed Lord Hardwicke, in *Vezey's* report of *Awelyn v. Ward* (i), is stated to have said, that he knew of no case to the contrary. But the two I have mentioned are clearly of this sort. They are often said to be *expedant* on the first estate.

3. All other limitations after previous estates, belong to the third class; and, in all of them, as in all of the first, there is a double contingency, as already explained. If the previous

estate take effect, these await its determination, and then vest in possession. If the other contingency happen, that is, if the first estate never vest, they take place immediately at the time when they first ought to have vested.

A devise after failure of the issue, or the heirs of *A*, without any previous estate to such issue, or heirs, is void in its creation, whether it be of real or personal property. Such a devise, with a previous contingency limitation, to the issue or heirs of *A*, falls under the first, or third, of the above classes, and is not void in its creation. The reason of the difference may be thus explained: When there is no previous estate limited, if *A* should have heirs, or issue, they might last for ever, and while they did, there would be nobody who could bar the estate limited over; and, therefore, a perpetuity might take place, which the law will not suffer. But, where the estate is previously given to the heirs, or the issue of *A*, and, (if future,) is limited to vest within the legal boundaries, in point of time, the principle of preventing perpetuities does not render it necessary to hold the devise over to be void in its creation. For, to consider: 1. The case of personal property; if the first estate vest, (whether limited to issue, [506] or heirs, is, there, exactly the same thing,) the entire interest and dominion is thereby exhausted, and there is nothing left upon which the subsequent limitations can attach, which, therefore, becomes immediately, by necessary

(g) Cited *supra*, p. 77. Note (x).

(h) *Supra*, p. 75.

[† 108] *Vide*, also, in the case of a

term, *Estcourt v. Warry*, B. R. T. 9 Will. 3. Comb. 437.

(i) 1 *Vez.* 422.

1780.

Doe
against
Fonnereau.

different conveyances, cannot unite. But, if they did not unite in this case, then the first limitation in the will was an executory devise, which remained contingent till the death of *Thomas*, and the estate given to the second son was also executory, and, being after an indefinite failure of issue, was too remote; therefore *quâcumque viâ datâ*, the devise by *Thomas*, under which the defendant claims, was good.

On

necessary operation of law, a mere nullity: 2. In the case of real property; if the first limitation is to *heirs*, the whole interest and dominion, in the same manner, vests with that estate; if it is to *issue*, (or *heirs of the body*, for I use those words as synonymous, because, in wills, they generally are so,) then, upon its vesting, such an interest is acquired, as enables the first taker, if he pleases, by the legal ceremony of a recovery, to convert his qualified, into an absolute, interest and dominion, and thereby, in like manner, render the devise over a mere nullity. This last was the case in the present cause of *Doe v. Fonnereau*. The point, which is so clear, upon the principles laid down by Lord Mansfield, in delivering the opinion of the court, was never before fully developed, and, directly, and explicitly, decided. Yet, to account for the certificate of the Judges in *Stephens v. Stephens*, we must suppose them to have held the same opinion, on this precise identical point. For all the devises there, as here, were executory: the limitation in fee to Sir *Richard*, (the testator's brother,) was after an indefinite failure of the issue of the grand-daughters, to whom a previous estate, in tail, was limited; and the certificate expressly says, that when the previous limitations should be spent, the estate would go over to him, or vest in him, by virtue of the last remainder to him in fee (a). But, to go a little farther, if what was argued by the counsel for the plaintiff, in this case, is law, (of which I believe there is no doubt,) viz. that the words "heirs of the body of *Thomas*," were words of purchase, and that the eldest

and other sons of *Thomas*, would have taken *successively*, in tail-male, under those words, What else were the contingent estates to the younger sons of *Thomas*, but executory devises, after the indefinite failure of the issue-male of their elder brother? According to *John de Mandeville's Case* (b), the second son of *Thomas*, (and so of the others,) must indeed have claimed, as heir-male of the body of his father, *per formam doni*, yet, certainly not by *descent*, for as the eldest son took, so must he, by purchase.

It may be observed here, as not foreign to the case I am reporting, that the rule in *Shelley's Case* is not perfectly accurate, in saying, that, when there is, in the same conveyance, a limitation to the ancestor, for life, and mediately or immediately, to his heirs in fee, or in tail, the words, "*his heir*," are not words of purchase. "When there is an intermediate vested remainder, as in *Coulson v. Coulson*, these words are words of purchase. They do not qualify the estate, or describe the quantity of interest, given by the first limitation, but vest another estate, viz. a remainder in fee, or in tail, in the tenant for life. They, at the same time, indeed, express the quantity of that other estate, but so do other words of purchase, in general, express the quantity of the interest: nor can it well be otherwise. The correct method of expressing the proposition would be, that the words, in such cases, do not limit any estate to the heirs as purchasers. Rolle seems to have intended to make this distinction, in the second volume of his Abridgment,

(a) Cases temp. Talb. 233.

(b) Cited supra, p. 501, Note (c).

On Tuesday, the 18th of April, 1780, his Lordship said; the court had decided that the devise to the second son was void, on the authority of the case of *Goodman v. Goodright*, as reported by Sir James Burrow, but that they had since seen a manuscript note of that case, taken by Kenyon, which assigned a ground for the determination different from that stated by Sir James Burrow [3]. That the court, upon this, entertained considerable doubts concerning the opinion delivered a few days before, and desired to have the case argued again.

1780.

DOE
against
FORBES & CO.

This day, his Lordship delivered the ultimate opinion of the court, as follows.

LORD MANSFIELD, — After the second argument, and upon consideration of the case, we were of opinion, and gave judgment accordingly, that either *Thomas* was tenant in tail, by connecting his estate for life, in the deed, with the limitation, in the will, to his heirs male, (without saying it was our opinion that they could unite,) or that the limitation over was too remote, as being after an indefinite failure of issue; and we could find no case where the court, in a will of real property, had raised an implication to confine the failure of issue to the life of the ancestor.

[508]

But,

ment, title *Remainder*. He divides the rule laid down in *Shelley's Case*, into two paragraphs; and says, in the first viz. with regard to an immediate limitation to the heirs, "The words 'the heirs' are words of limitation, and not of purchase (a)." But in the other, he changes the expression. "When the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, there is an estate in fee, or in tail, to his right heirs, *mediately*, (viz. where an estate for life, or in tail, is interposed between the said estates) *this remainder shall attach in the ancestor, and shall not be in abeyance (b).*"

[3] I have been favoured by Mr. Kenyon with a copy of his note of that case, which is much fuller than either the report by Sir James Burrow, or that since printed, in the first volume of *Blackstone's Reports*. It agrees, however, in the material part of the judgment of the court, with Mr. Justice *Blackstone's* account; and it appears, by both, that the decision went upon

the alternative, either of the niece having taken an estate-tail by implication, or of the first devise (to the heirs of the body of the niece by any other husband,) being too remote, and, of course, the second. The court thought it unnecessary to determine, whether the niece took an estate-tail by implication; and according to Mr. Kenyon's note, Lord Mansfield, in giving judgment, said, "The whole of the case comes to this; Whether Mrs. *Moslyn*, (the testatrix,) intended, by the devise, to give the heirs of the body of her niece *A. L.* by a second husband, the remainder, reversion, or estate, (whatever it is called,) after the deaths of herself, *E. W.* and *A. L.* and failure of issue between them; or whether she meant to give an estate in possession, to the issue of *A. L.* by a second husband." His Lordship, therefore, (being clear that it was not an immediate devise,) put the case entirely on the remoteness of the first devise. The manner in which he is said to have stated the question, in 2 *Burr.* 873. is mentioned *supra*, p. 500, 501.

(a) 2 *Roll. Abr.* 417. *Remainder* (G)

(b) *Ibid* H. pl. 3.

1780.

DOE
against
FOKNEREAU.

[509]

But, afterwards, turning the cases on this subject in our minds, and considering the reasons on which they proceed, namely, to prevent perpetuities; we stopped the judgment, and desired the case might be again spoken to. It has been argued a third time, and we have changed our opinion, and shall give our reasons. The rule is unquestionable, that there cannot be an executory devise after an indefinite failure of issue. But that is not the case here. We all think, that the estate for life being by one instrument, and the limitation in tail by another, they cannot unite, and that the heirs-male of *Thomas* would have taken by purchase. This is a settled point; and we lay it down as our clear opinion. What are the limitations here? They are to the heirs-male of the body of *Thomas*, and, in default of such issue, to the second, and other sons. There are two ways in form of law, in which this last limitation may take effect. 1. If *Thomas* dies, leaving issue-male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2. Suppose the other alternative, (which really happened,) that *Thomas* has no son, then it is an executory devise to the second son, if *Thomas*, at his death, leave no issue-male. This is within the limits established by law to prevent perpetuities. We have looked into the cases, to see how far this reasoning upon principle can be supported by authorities; and we think there are three which go a great way. 1. In *Stephens v. Stephens*, the court took a large stride of twenty-one years after a life in being. The argument was, that this would not create a perpetuity. Former cases had said, a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child, and alienation was not restrained for any longer time in *Stephens v. Stephens*, for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one. An obvious objection to the alternative in this case is, that, if the limitation over is a remainder, it cannot be turned into an executory devise. That is true, if it ever vest as a remainder. But here it might, or might not, upon a contingency; and it never did. 2. So, in *Hopkins v. Hopkins*, Lord TALBOT decided, in support of the intent, that a limitation, which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise. This he did upon principle, without precedents; and a great estate is now held under this determination. 3. *Brownswold v. Edwards* is another strong instance where it was held that a devise may operate either way, according to the event (a). These are the authorities which go along with the principles I have stated

(a) *Canc.* 20 March, 1750-1. 2 *Ves.* 249.

and enable us to support the intention of the testator. As to that, there is no doubt that he meant to give successive estates in tail-male.

1780.

Judgment for the plaintiff.

MAURICET against BRECKNOCK.

Wednesday,
22d Nov.

IN *Trinity Term*, last, (on *Tuesday*, the 30th of *May*,) *Baldwin* moved for a rule to shew cause, why the inquisition taken upon the writ of enquiry in this cause, should not be set aside, on account of the smallness of the damages. It was an action on the case, for maliciously suing out a commission of bankruptcy against the plaintiff, and also for maliciously holding him to bail for 1020*l*. The defendant let judgment go by default, upon which a writ of enquiry was executed, and the jury gave only 5*l*. damages. The affidavit upon which *Baldwin* moved, stated, that the plaintiff's attorney had proved, before the jury, that his bill of costs to the plaintiff, for superseding the commission of bankruptcy, amounted to upwards of 30*l*. and that no evidence was produced on the part of the defendant. He cited *Markham v. Middleton* (a), where the action being for a tradesman's bill amounting to 333*l*. and the enquiry jury having given only a penny damages, the verdict was set aside [1].

It is a general rule, that the court will not set aside a verdict, in an action for a tort, on account of the smallness of the damages.

The court, after some difficulty, granted the rule.

This day *Howorth* shewed cause, and insisted upon it, as an established rule, that the court will never set aside a verdict on account of the smallness of the damages.

The *Attorney General*, for the plaintiff, observed, that every rule of that sort admits of exceptions [2]; that the verdict here, would appear to be glaringly absurd, if the nature of the action were considered; and that the defendant, by suffering judgment to go by default, had confessed that he had acted maliciously; (the proof of malice being necessary to maintain the action).

Lord MANSFIELD, — He has confessed malice, in point of fact, and merely for the purpose of letting the plaintiff in, to prove the degree of injury he has received.

The rule discharged.

(a) *B. R. T* 19 *Geo. 2.* 2 *Str.* 1259.

[1] But, in that case, the plaintiff's attorney produced a witness, who had told him, he could prove the bill, and who, when the jury was sworn, refused to give evidence, and the sheriff thought he could not adjourn. The court thought, under such circumstances, the sheriff might, and ought to have adjourned, on the authority of several cases

there cited. The smallness of the damages, therefore, was not the ground of that determination.

[2] Thus, if the smallness of the damages arises from a mistake, in point of law, of the sheriff, (as in *Markham v. Middleton*,) or of the jury, (as in *Woodford v. Eades*, 1 *Str.* 425.) the court will set aside the verdict.

1780.

Wednesday,
22d Nov.NOBLE and Another *against* KENNOWAY.

An underwriter is bound to know the nature and peculiar circumstances of the branch of trade to which the policy relates. — To prove the manner of conducting a particular branch of trade at one place, evidence may be given to shew the manner in which the same branch is carried on at another place.

[511]

THIS was an action on a policy of insurance, which was tried before Lord MANSFIELD, at Guildhall, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiffs. On *Thursday*, the 9th of *November*, *Dunning* obtained a rule, to shew cause, why there should not be a new trial; and this day, the case was argued, by *Lee* and *Baldwin* for the plaintiffs, and the *Attorney General* and *Dunning*, for the defendant.

The case, and evidence, upon Lord MANSFIELD's report, appeared to be as follow: The insurance was upon the ships, the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port, or ports, of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, and upon any kind of goods and merchandizes; and also, on the ships till they should be arrived at their port of discharge, and should have moored at anchor twenty-four hours, and on the goods and merchandizes, until the same should be there discharged and safely landed. By a clause in the policy, money advanced to the fishermen was insured. The *Anne* arrived safe on the coast of *Labrador*, on the 22d of *June*, and the *Hope*, on the 14th of *July*, 1778. From the time of their arrival, the crews were employed in fishing, and had taken out none of their cargoes, except at leisure hours, (partly on *Sundays*,) such things as were immediately wanted. On the 13th of *August*, an *American* privateer entered the harbour, (*Temple Bay*), and took both the vessels, there being nobody at that time on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unnecessary delay, in unloading the cargoes, in consequence of which they had been exposed to capture, and that the under-writers ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on the words of the policy, and on the usage of the trade. They called one *Astwick*, the captain of the *Anne*, who said, that he had been the same voyage three times in the three last years, and that they had proceeded in the same manner during each of the voyages; that he did not think the plaintiffs had warehouses sufficient to have held the goods, if they had been landed; and that there were no settlements on the coast of *Labrador*, but those belonging to the plaintiffs. One of the sailors swore to the same effect. The plaintiffs then called one *French*, to prove the custom of the *Newfoundland* trade. This evidence was objected to; but Lord MANSFIELD admitted it; and the witness swore, that, in

the *Newfoundland* trade, it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish, and part of their old cargo, on board, at the same time. That the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo being chiefly salt, and provisions, it is taken out gradually, for curing the fish, and for consumption. This witness was confirmed by one *Newman*. Neither *Newman* nor *French* had been at *Labrador*. One *Hunter* was then called, who proved, that, some years since, he used to send vessels of his own, and also chartered vessels, to *Labrador*, and that it was usual, in chartering vessels, to stipulate, that they should have sixty days allowed for discharging. That he apprehended they were oftentimes longer, in fact, and that it was not so easy to discharge a cargo at *Labrador*, as at *Newfoundland*.

1780.

NORLE
against
KENNOWAY.

In support of the rule for a new trial; it was contended, that, as the policy on the ships expressed twenty-four hours after their safe arrival, no under-writer could suppose, that he was to be liable for the goods for fifty or sixty days longer. There was nothing that bespoke an insurance upon a trading voyage. The only reasonable construction of the policy is, that the goods are to be protected until they can be reasonably and conveniently landed. As to the evidence concerning the *Newfoundland* trade, it ought not to have been admitted. In cases of great public branches of trade, such as that to the coast of *Guinea*, the general usage may be given in evidence, and the under-writer is perhaps, bound to take notice of it; yet on policies on *Guinea* ships, it is most usual to insert a special clause for protecting the ship, and goods, during her stay. This, though it may be unnecessary, shews, at least, that where there is no general usage, the under-writers shall not be liable, without an express stipulation. But, here, there can be no general usage; the trade has been established but a few years, and is entirely in the hands of the plaintiffs. *Newfoundland* and *Labrador* are distant and discontiguous, and, although the object of the voyages to both, may be the fishery, yet the fishing trade is conducted very differently at different places. Would the practice at *Greenland*, *Nova Zembla*, on the coast of *Scotland*, or in the new whale fishery in the *Mediterranean* [† 109], be evidence in this case? If a merchant, who carries on the fishery on the coast of *Labrador*, chooses to adopt the methods and practice in use at *Newfoundland*, he certainly may; but, till this becomes generally known, the under-writers are not bound to take notice of it. There will be no inconvenience to the trade, by a decision in favour of the defendant, because a special clause may be inserted in future policies.

On

1786.

NOBLE
against
KENNOWAY.

[513]

On the other side it was argued, that, what is the usage in a similar branch of trade, is evidence. That it was a fair presumption, that a new branch recently established, would be conducted in the same manner with other branches of the same business. That, in a late case of *Puller v. Offley*, which was tried at *Guildhall*, evidence of the general practice in the *Guinea* trade had been admitted, upon the construction of a policy, on a ship engaged in a particular branch of that trade. The insured could not, it was admitted, take an unusual and unreasonable time to unload, and, if it had appeared that the time employed in this case, had been longer than what was usual and reasonable at *Newfoundland*, the plaintiffs, perhaps, would not have been entitled to a verdict; but the jury were to judge, under the circumstances, whether the time was unreasonable, and they thought it was not.

LORD MANSFIELD, — The trade of fishing on the coast of *Newfoundland*, especially from the west of *England*, has been known and practised for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance, here, is on the ships, and the goods till landed. The defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided, by knowing the usual practice of the trade. Every under-writer is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established, or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year. This trade has existed, and has been conducted in the same manner, for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at *Newfoundland*. I still think the evidence on that subject was properly admitted, to shew the nature of the trade [&c]. The point is not analogous to a question concerning a common-law custom.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, — I think there was sufficient evidence, without calling in aid the usage in the *Newfoundland* trade; for it appeared, on the face of the policy, that the fishery was the purpose of the voyage. But I think the evidence objected to was properly admitted. If it can be shown, that the time would have been reasonable in one place, that is a degree of evidence to prove, that it was so in another. The effect of such evidence may be taken off, by proof of a difference of circumstances. It is very true, that the custom of one manor is no evidence of the custom of another; that has been determined in many cases; but the

point

point here is very different ; it is a question concerning the nature of a particular branch of trade.

The rule discharged.

1780.

RUSSEL *against* LANGSTAFFE.

Wednesday,
22d Nov.

ONE *Galley* having had frequent money transactions with the plaintiff, who was a banker, and having over-drawn his cash account, the plaintiff suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve. Upon this, *Galley* applied to the defendant, and he indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank ; *i. e.* without any sum, date, or time of payment, being mentioned in the body of the notes. *Galley* afterwards filled up the blanks with different sums and dates, as he chose ; and the plaintiff discounted the notes. One of them was made payable on the 22d of *September*, two on the 27th of *September*, and two on the 4th of *October*. These notes not being paid when they became due, the plaintiff on the 14th of *October*, called upon the defendant, as indorser, for the payment of all of them, and upon his refusal, brought this action, which was tried, before *HOTHAM, Baron*, at the last assizes for the county of *Durham*. It appeared that *Galley* had become a bankrupt on the 20th of *September*, and that, on the 27th, the defendant had been present at a meeting of his creditors. It also appeared that *Russel* knew the notes were blank at the time of the indorsement. The plaintiff and the defendant lived in the same town.

An indorsement written on a blank note or check, will afterwards bind the indorser for any sum and time of payment which the person to whom he entrusts the note chooses to insert in it.

For the defendant, at the trial, it was objected, 1. That these notes being blank at the time of the indorsement, they were not then promissory notes, and that no subsequent act of *Galley* could alter the original nature or operation of the defendant's signature, which, when it was written, was a mere nullity. It was also objected, 2. That the notice of the non-payment by the drawer, was not given soon enough to the indorser [17].

The Judge being of opinion with the defendant on the first point, he directed the jury accordingly, and they found a verdict for him.

On *Wednesday*, the 18th of *November*, *Arden* obtained a rule to shew cause, why there should not be a new trial ; which was argued this day, by the *Attorney General, Lee*, and *Scott*, in support of the verdict, and *Dunning* for the plaintiff.

1. The *Attorney General* gave up the first point, but *Lee* said he thought it of consequence enough to be argued. It never

[17] *Vide Bickerdicke v. Bellman, B. R. M. 27 Geo. 3. 1 Term Rep. 405.*

1780.

RUSSEL
against
LANG-
STAFFE.

never had been determined, he said, and deserved consideration. The copper-plate checks in this case, without sum, or date, were mere waste paper, and *Langstaffe's* name upon them had no more effect than if written on any other blank piece of paper. An indorsement supposes a bill, or promissory note, then actually existing; and if a party take an indorsed bill, or note, knowing, at the time, that it was not the subject of an indorsement when the name was written on the back of it, he is not injured if he is afterwards told, that he shall not be permitted to treat it as a bill or note. The very declaration, in this action, necessarily states a pre-existing note, previous to the indorsement; and such forms are not to be considered as useless, and without a meaning. How can the plaintiff be permitted to say, that by this signature, the defendant contracted for a given sum, when he knows, that, at the time of the signature, he did not contract for any thing? This defence might not be competent, as against a third person, but it seems just and fair, as against the plaintiff, who was aware of the original nature of the transaction. 2 On the other point, they admitted, that what shall be deemed reasonable notice to an indorser, of non-payment by the drawer, ought properly to be decided by the jury [† 110]; but said it was well established, that such notice ought to be as early as possible. That, where the parties live at a distance, the notice ought to be given by the first post, though, if any thing delay the going out of the post at the usual time, that will be an excuse; but that, here, the parties lived in the same town, and no notice had been given till ten days after the time of payment, even in the case of the notes payable in *October*. As to the bankruptcy, it had been frequently ruled by Lord MANSFIELD, at *Guildhall*, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer, or acceptor, has become a bankrupt; as many means may remain of obtaining payment, by the assistance of friends, or otherwise.

[516] On the other side, it was stated, by *Dunning*, that the jury, whose province it was to decide on the *second* point, were, upon that point, clearly with the plaintiff, and that they had found a verdict for the defendant, in deference to the Judge's opinion, on the other question. As to that question, he insisted that there could not be a doubt but the direction was wrong. It strengthened the plaintiff's case, that he knew the notes were blank when indorsed. For what purpose could he suppose the indorsements were made by the defendant, but to authorize *Galley* to fill them up with

[† 110] *Vide* on that point, *Medcalf v. Tindal* v. *Brown*, B. R. T. 25 Geo. 3. v. *Hall*, B. R. T. 22 Geo. 3. *Appleton v. S. C. B.* R. E. 26 Geo. 3. *Sweetapple*, B. R. M. 23 Geo. 3. & 1 Term Rep. 167.

with any sum he pleased, and to bind himself, as his security, to that extent: The declaration states the notes to have been made before the indorsements; so all declarations against indorsers must; but the defendant, by indorsing them, concluded himself from contending, or proving, that they were not filled up when he signed them.

Lord MANSFIELD,—There is nothing so clear as the first point. The indorsement on a blank note is a letter of credit for an indefinite sum: The defendant said, "Trust Galley to any amount, and I will be his security [1]" It does not lie in his mouth to say, the indorsements were not regular. The direction having been wrong on this point, it is needless to go into the other.

The rule made absolute [1].

[1] *Vide Collis v. Emet*, C. B. H. 30 Geo. 3. H. Bl. 313. 316. 319.

[1] Before there was an opportunity for a new trial, another action, between the same parties, and under similar cir-

cumstances, came on, before Lord Mansfield, at Guildhall, and a verdict being found for the plaintiff, the defendant submitted in this action, without going to a second trial.

The KING against VAUGHAN.

Thursday,
23d Nov. .

CAUSE shewn against a rule for an attachment against the defendant, for acting as an attorney of this court, after having been struck off the roll.

Lord MANSFIELD stated the practice of the court to be, that, if the defendant, by his *affidavit*, fully denies the charge, on which the rule for an attachment was granted, that is sufficient; the weight of the evidence, or the credibility of what is sworn, is never considered; but if the defendant is hardy enough to swear falsely, he is left to be punished by indictment. In Chancery, he said, they proceed differently: they examine the defendant on interrogatories, and also examine witnesses on both sides, and then decide upon the truth of the charge.

In this case the court thought the charge was not sufficiently answered.

The *Attorney General*, and *Peckham*, for the prosecution: *Dunning* and *Mingay*, for the defendant.

The rule made absolute [1].

[1] In *Trinity Term*, 21 Geo. 3. the imprisonment in *Clerkenwell* prison; defendant was sentenced to six months

1780.

RUSSEL
against
LANG-
STAFFE.

When a person, against whom an attachment is prayed, positively answers and denies the charge, this court always refuse the attachment, without entering into the credit of the parties or the probability of the evidence.

[517]

1780.

Thursday,
23d Nov.KINNERSLEY *against* WILLIAM ORPE.

A person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under 5 Geo. 3. c. 14.

THIS was an action of debt, by the owner of a fishery, for a penalty of 5*l.* under the statute of 5 Geo. 3. c. 14. § 3 & 4. for killing fish in his fishery. The defendant was the servant of a Doctor *Colton*, who claimed a right to the fishery in question, and an action of trespass had been brought against some of his servants, by the present plaintiff, to try the right; which action was tried at *Stafford*, in summer 1779, and a verdict found for the plaintiff. The defendant applied for a new trial in that cause, but it was refused (a). However, Doctor *Colton* not being satisfied, gave the plaintiff notice, that he should order one of his servants to fish in the same place, with the express view of procuring an opportunity to try the right again. He accordingly did so, and it was in obedience to his orders for that purpose that the defendant committed the act for which the present action was brought. This the counsel for the defendant offered to prove at the trial, and contended, that, when it should be proved, the plaintiff ought to be nonsuited, for that such an assertion of a right, was not an offence within the statute, there being an express exception in § 5. in favour of persons who shall have a "just right or claim." PERRY, *Baron*, before whom the cause was tried, at the last assizes for *Staffordshire*, decided this point against the defendant, and refused to hear the evidence. The plaintiff produced no other proof than the record of the verdict and judgment in the former cause of *Kinnersley v. Orpe*, to shew his exclusive right to the fishery. This evidence was objected to, on the part of the defendant, because the former action, and this, were not causes between the same parties, the name of the former defendant being *Thomas*, and that of the present *William*. The Judge, however, over-ruled the objection, and held that the evidence was not only admissible, but conclusive, (both the *Orpes* having acted under the authority of *Colton*, who was the real defendant in both causes,) unless collusion could be shewn in obtaining the former verdict and judgment. This was not attempted; and the jury, agreeably to the Judge's direction, found for the plaintiff.

On *Thursday*, the 9th of *November*, *Bower* moved for, and obtained, a rule to shew cause, why there should not be a new trial, on the ground of a misdirection in the several particulars above stated; and, this day, cause was shewn, by *Cowper* and *Swinerton*.

Beacroft was going to answer them, but the court told him, it was unnecessary. They thought the defendant ought

[518]

(a) *Kinnersley v. Orpe*, *supra*, p. 56.

bought to have been let in, to prove the notice by Doctor Cotton, and that, if *that* had been proved, this would not have been a case within the act.

BULLER, *Justice*, observed, that, to construe it in the manner contended for on the part of the plaintiff, would be to read the clause of exemption, "*right and claim*," instead of "*right or claim*." The court also thought, that the record in the former cause, though admissible evidence, was not conclusive.

The rule made absolute.

BRANCH *against* EWINGTON.

1780.

KINNERS-
LEY
against
WILLIAM
ORPE.

Friday,
24th Nov.

ACTION of covenant on an indenture of apprenticeship, by the master, against the father, of the apprentice. The indenture, as stated in the *declaration*, was in the common form, under the statute of 5 *Eliz. c. 4*; the plaintiff expressly covenanting to find the apprentice meat and lodging, the defendant to find him cloaths and washing, and the apprentice, that he would serve faithfully, &c. and for the true performance of all, and every, of the said covenants, each of the said parties bound himself to the other. *Breach* assigned, that the apprentice had absented himself from the service. *General Demurrer*.

Is a common indenture of apprenticeship, under 5 *El. c. 4*. between the father, son, and master, the father is answerable for what is to be performed by the son.

Peckham, in support of the demurrer, contended, that the parties were only bound for the express covenants which they had *severally* entered into. That it would be absurd to construe the general words so as to render the defendant liable for breaches of such of the covenants as were to be performed only by the son. The same construction would render the father liable to the son, or the son to the father, for those which the master was to perform. In all covenants, the intention is to govern. The master has other remedies besides an action of covenant against the apprentice, if he absent himself. He may, by application to the justices, have him punished, under 5 *Eliz. c. 4*. § 35; or, if he wants compensation for the loss of service, he may compel him to make it up by subsequent service, under 6 *Geo. 3. c. 25*. If the construction contended for on the part of the plaintiff should prevail, parish-officers will be liable for the breaches of similar covenants in parish indentures [1].

[519]

Lord MANSFIELD stopped Baldwin, who was to have argued on the other side, and said, nothing was clearer than

[1] In parish indentures under 43 indentures, 1 *Burns Justice*, 13th *Ed. El. c. 2*. § 5. the parish officers do not p. 85. covenant. *Vide* the form of such in-

1780.

than that the father was bound for the performance of the covenants by the son.

Judgment for the plaintiff [2].

[2] *Vide Whitley v. Loftus, B. R. M.*
10 Geo. 1. 8 Mod. 190. which is direct-

ly in point, and was meant to have been cited by *Baldwin*.

Friday,
24th Nov.

WYLLIE against WILKES.

The penalty of a bond for securing an annuity having been forfeited before a bankruptcy, the value of the annuity may be proved under the commission, and the certificate is a discharge from future payments, notwithstanding the arrears shall have been paid after the forfeiture and before the bankruptcy.

* [520]

ACTION of debt upon a bond conditioned for the payment of an annuity to the plaintiff, for seven years, by quarterly payments, the first payment to be made on the 25th of *December* 1774. The defendant, after craving *oyer*, and setting forth the condition upon the record,—which recited, that the annuity had been *agreed* to be paid to the plaintiff, in consideration of his having dissolved a partnership between himself and one *Ox'lade*, a co-obligor in the bond with *Wilkes*, in order that *Ox'lade* might take *Wilkes* into partnership,—*pleaded*, that he became a bankrupt, and a commission issued against him, on the 24th of *March* 1777, that he afterwards obtained his certificate on the 5th of *January* 1778, and that the cause of action accrued before he became a bankrupt. Upon this plea, issue was joined; and the cause came on for trial, before Lord MANSFIELD, at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case which stated—That a * quarter's annuity became due on the 25th of *December* 1776; That the arrears due on that day were paid on the 18th of *March* 1777; and that the defendant became a bankrupt; that a commission issued against him, and he obtained his certificate, as stated in the plea.—The question for the opinion of the court was, whether the plaintiff's cause of action accrued before the bankruptcy.

The case was argued on *Tuesday*, the 14th of *November*, by *Wood* for the plaintiff, and *Dunning* for the defendant.

Wood argued as follows—The certificate is not a bar in this case. The plaintiff had no legal remedy on the bond, at the time when the commission issued, and therefore could not have been admitted as a creditor under the commission. All the instances in the court of Chancery, where annuitants have been permitted to prove under commissions of bankruptcy, have been in cases where the bond has been forfeited, and thereby a legal remedy for the penalty has been acquired. Here the forfeiture which would have been incurred by the non-payment of a quarter of the annuity on the 25th of *December* 1776, was waved, and done away, by the payment and acceptance of the arrears, at a subsequent day. In this respect, the present case re-

sembles

seems that of *Webster v. Bannister* (a), where your Lordship said, that you should have held the act of payment at a future day, to be in itself proof of a waiver of the forfeiture of an annuity bond. The penalty was not a subsisting debt after the waiver. It could not, therefore, be proved under the commission, nor discharged by the certificate, for no debt can be proved that is not *demandable* at the time of the bankruptcy. Indeed, by the statute of 4 & 5 Ann. c. 16. § 12. payment of money secured by a penalty in a bond, *after* the day in the condition of the bond, amounts to a parliamentary waiver of the forfeiture incurred by the non-payment on that day. It is true, the words of the statute specify only bonds conditioned for the payment of a *lesser sum, at a day or place certain*, and mention the payment of *the principal and interest* due. But it cannot have been intended to confine the provision to conditions for the payment of one lesser sum, and to exclude bonds for securing repeated lesser sums to be paid successively, or such upon which no interest is to be paid. But, besides the penalty in this bond, there is, in the condition, an agreement, or covenant, under the seal of the defendant, for the payment of the annuity. Upon this, an action of debt, or covenant, might be maintained, exclusive of the remedy on the penalty; and it has been frequently decided, and particularly in a late case of *Cotterel v. Hooke* (b) that the remedy for the growing payments of an annuity, when secured by covenant, are not barred by a bankruptcy and certificate. By the statute of 8 & 9 Will. 3. c. 11. § 8. in actions upon bonds for non-performance of any covenants, or agreements, in any indenture, deed, or writing, contained, the plaintiff is to recover, not the penalty, but damages for every breach he shall prove. This bond is of that sort, and since that statute, a breach of the covenant and agreement does not entitle the plaintiff to the *penalty*, even at law, but only to have it stand as a security for future breaches.

Dunning,—The inclination, both of courts of law and equity, has always been, to give to bankrupts who have acted fairly, a complete discharge. It is impossible to imagine a case more proper to shew the hardship of the doctrine contended for on the other side, than the present; for the defendant was made a bankrupt only on the 24th of March, and on the 25th, the very day after he became liable, (if the plaintiff's action should be sustained,) to a quarter's payment of this annuity. In *Webster v. Bannister*; issue was taken on the fact of payment after the day, and therefore the question, how far such payment would have been a waiver of the forfeiture, was not before the court. Your Lordship might use some expression, similar to what

1780.

WYLLIE
against
WILKES.

[521]

(a) E. 20 Geo. 3. *supra* p. 393. (b) H. 19 Geo. 3. *supra* p. 97.

1780.

WYLLIE
against
WILKES.

[522]

has just been stated, in that case of *Webster v. Bannister*; but you certainly did not mean to give a solemn opinion upon the point. Had the case required it, you would have given the question a more thorough consideration. The idea of waiver originated from the statute of *Queen Anne*, but that statute has never been understood to relate to bonds for securing annuities. The first case in Chancery on this subject was in 1738, *Ex parte Le Compte* (b). The next in 1741, *Ex parte Belton* (c). In both these, the annuitant was let in to prove the value of his annuity, on the ground that the bond being forfeited by non-payment on the day, the penalty had become a debt at law. There was, however, no question about any waiver by a subsequent payment in those cases. But, in the case of *Perkins v. Kempland* [1], which was decided a few years ago in the court of Common Pleas, it was unanimously held, that a payment *after* the day would not discharge the forfeiture of an annuity bond, which, when once it has become absolute, can never be made conditional; that such bonds are not within the statute of *Queen Anne*; that, if a forfeiture has happened before a bankruptcy, the annuity may be valued, and proved under the commission; and that, after the certificate, the bankrupt is not liable to any future payments. This case is decisive.

Wood, in reply,—In *Cotterell v. Hooke*, which was subsequent to *Webster v. Bannister*, the case of *Perkins v. Kempland* was cited: That case was simply a bond containing a penalty for securing the annuity; There was no agreement contained in the condition.

BULLER, *Justice*,—The cases of *Webster v. Bannister*, and *Perkins v. Kempland*, may stand very well together. As to the case of *Cotterell v. Hooke*, that was an action upon the deed of covenant. Here, if you had an election, and could have proceeded upon the agreement, you have made your election, and taken the other course, for this is an action for the penalty.

The court took time to consider; and, this day, Lord MANSFIELD delivered their unanimous opinion, as follows:

Lord MANSFIELD, (after stating the pleadings and the case,)—Before, and at the time of, the bankruptcy, no money was due under the condition of the bond. The penalty had been incurred, a quarter's annuity not being paid on the day, but the obligee had afterwards received the money. The question is, whether there was any debt due at the time of the bankruptcy; and, as between the parties, on general principles, when a forfeiture lies in compensation, and the person entitled to the compensation

receives

(b) 1 Atk. 251.

(c) *Ibid.*

[1] T. 16 Geo. 3. Since reported, 2

Blackst. 1106. Mr. Dunning read much fuller note of the case than what is there given.

receives satisfaction after the forfeiture, he can never resort back to the penalty. Take the common case of rent: If payment is made after the day, you can never recur to the forfeiture. All forfeitures are odious, if carried beyond their true intent. Besides, (I here speak my own opinion,) in questions between the parties, I should exceedingly incline to say, that annuity bonds are within the reason, though not the letter, of the act of the 4th and 5th of *Queen Anne*; an act made to remove the absurdity which *Sir Thomas More* unsuccessfully attempted to persuade the Judges to remedy in the reign of *Henry VIII*. For he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs; and when they said they could not relieve against the penalty, he swore by the body of God, he would grant an injunction. This is a remedial law, and, if a case is within the mischief, the remedy ought to extend to it. I should have thought, therefore, that payment *after* the day might be pleaded to an action on an annuity bond. In the case of *Westber v. Bannister*, as far as it was necessary to consider the point, we were all inclined to think, that, even without an express agreement to give farther time, the receipt of the money after the day would have been sufficient. But, insolvent acts differ from the bankrupt laws; there is no authority, no commissioners; under the insolvent acts to set a value upon the annuity. The present case arises on a bankruptcy. It is to be lamented that so large a class of creditors as annuitants are, should be left without any express provision in the bankrupt laws. It is hard upon them that they should be excluded from proving under the commission, (when perhaps the other creditors may receive 15 shillings in the pound under it,) and should be left only to a fruitless remedy against the bankrupt. It is also hard upon an honest bankrupt, who has given up his all to his creditors, that he should still continue answerable for debts which he has nothing to satisfy. This is a great defect and chasm. It is a pity that the legislature should be silent, and should force the court, in order to attain the ends of justice, to invent legal subtleties, which do not come up to the common understanding of mankind. *That* has been done in the case of annuities. The court of Chancery has laid hold of this subtlety. It has said,—The penalty is the debt if the forfeiture has been once incurred, and you may have a value set upon your annuity, and come in as a creditor, under the commission.—If it is objected, that the forfeiture was waved, the court answers,—No matter for that; it shall be still in force, because it is for the benefit both of the creditor and the bankrupt that it should be so.—

1780.

WYLLIE
against
WILKES.

[523]

1780.

WYLLIE
against
WILKES.
[524]

This has been settled, and we all adhere to the determination, as far as this case goes, as a legal subtlety, established for good purposes, but not to be drawn into principle or argument in other cases. It has been the foundation of practice in the court of Chancery, and has received a solemn consideration in the court of Common Pleas, in the case of *Perkins v. Kempland*, which is an authority directly in point. That court thought annuity bonds were not within the statute of Queen Anne, and, for that part of their opinion, relied on what Lord HARDWICKE said; in a case *Ex parte Winchester (a)*, viz. that the words, "at a day or place certain," are material words in the statute, and that bonds, not given for the payment of a lesser sum at a day or place certain, are not within it. I hardly think he would have considered those words as sufficient to take a case out of the statute, which is clearly within the reason and meaning of it, if it had not been to give the party the advantage of the equitable subtlety, by which he was enabled to prove under the commission. We consider ourselves as bound by the authorities, as far as the present case goes; but no further.

The *Posse* to be delivered to the defendant.

(a) In *Canv.* 1744. 1 *Atk.* 118.

Friday,
24th Nov.

The KING, on the Prosecution of PARBURY and Another, Executors of DAWES against the Governor and Company of the BANK of ENGLAND.

The court will not grant a *mandamus* to the Bank to transfer stock, because there is a remedy by an action on the case, if they refuse. — 24. Whether executors, who take no beneficial interest, and have no debts to pay, are intitled to have the stock of their testator transferred to their name.

THIS was an application for a *mandamus* to be directed to the defendants, commanding them to permit the prosecutors to transfer 1000*l.* Bank stock, as having been the property of their testator. One *Lascelles*, being possessed of 12,000*l.* Bank stock, which stood in his name, by his will appointed *Dawes* his executor, and gave him, as a legacy 1000*l.* part of the 12,000*l.* *Dawes*, who proved the will of *Lascelles*, but never transferred the stock to his own name, by his own will, of which he appointed the prosecutors executors, bequeathed to his kinswoman " *Lydia Fennymore*, if living at the time of my decease, the sum of 1000*l.* of the capital stock of the " *Bank of England*, and, although I have not transferred " *Mr. Lascelles's* stock into my name as yet, the property " is wholly and solely in me, as may be seen by his will." Upon *Dawes's* death, the prosecutors proved his will, and applied to the Bank for leave to transfer the 1000*l.* which was refused, unless they should produce a certificate of the

the death of *Lydia Fennymore* [1]. Upon this they applied to the *Foundling Hospital*, where it seems she had been placed by *Dawes*, (whose natural daughter the prosecutors swore they believed she was,) and where they found by the books, and registers, strong evidence of her death, and that she died before the testator; and they were, at first promised the certificate required, but the governors of the *Hospital* afterwards refused to grant it, and the prosecutors applied again to the *Bank*, stating the evidence of the death of the legatee, and that the certificate had been refused. Upon this second application, they were told the certificate could not be dispensed with. This court was therefore moved, upon *affidavits* stating the above circumstances, and a rule to shew cause was granted, but with directions, that notice of the rule should be given to the *Foundling Hospital*.—It appeared, upon inspecting the will of *Dawes*, that particular legacies were given by it to the prosecutors.

1780.

The KING
against
The BANK
OF ENGLAND.

This day, cause was shewn, by the *Attorney General*, and *Jackson*, on the part of the *Bank*; and *Beacroft*, on the part of the *Foundling Hospital*.

On the part of the *Bank*, it was urged, that they had no satisfactory evidence of the death of *Lydia Fennymore*, and that it had been the rule and practice with them to transfer stock to legatees directly, without the interposition of the executors: That this was founded on the construction which had been put on the statute of 5 *Will. &c. Mar. c. 20.* by which the *Bank* was established, and of the different charters they had received from the crown, under the authority of that statute; That all the acts, relative to stock, use the word “*devise*” and therefore the opinion had been adopted, that the legislature intended, that, in respect to the manner of transmission by will, stock should pass immediately as *real property*, (to which the “*devise*” is pecuniary appropriated,) does; That was the opinion of *Serjeant Pengelly*, who had been counsel for the *Bank*, and upon whose advice they had pursued the practice just stated.—They said, however, that the *Bank* was extremely ready to act in any manner the court should direct.

For the *Foundling Hospital*, it was said, that,—as the legacy to *Lydia Fennymore* was lapsed, and there was reason to believe the testator was a bastard, (which however was not sworn to,) or at least, that no next of kin could be found, and as the executors, having legacies, could take no beneficial interest, and it was not pretended there would

[526]

[1] It appeared, that it is the practice of the *Bank*, and the other great companies, never to permit the transfer of stock without the production ei-

ther of a probate of the will of the person last intitled, or a certificate of the actual death of such person.

1780.

The KING
against
The BANK
of ENGLAND.

would be any debts to be paid,—they were advised that the money belonged to the Crown; That, upon this, they had applied to the *Treasury* for a grant of it, for the benefit of the *Hospital*, which application they had reason to think would be successful; That, under these circumstances, they had not chosen to facilitate the transfer of the stock, thinking it safest in the hands, and under the protection, of the *Bank*.

Dunning, on the part of the prosecutors, contended, that the legal title was clearly in them, and that the court would not enquire to whom they were accountable for the equitable interest; That the use of the words “*devise*” or “*devisee*” in acts or charters hastily and ignorantly penned, could not alter the nature or incidents of a species of property clearly personal; That this application was not to the favour or equity of the court; but was founded on right, in order to compel the defendants to do their duty.

LORD MANSFIELD,—When there is no specific remedy, the court will grant a *mandamus* that justice may be done. But where (as in this case) an action will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *mandamus* [1]. I do not think this a clear case. It appears, on the face of the will, that the executors have no beneficial interest. If the testator was a bastard, the King is the next of kin [†111]. Here neither any person claiming as next of kin, nor the Crown, are before the court. Notice has been given to the *Bank* not to permit the transfer. The *Bank* is therefore in the nature of a stake-holder only. The real question is between the Crown, (or the *Foundling Hospital* as standing in the place of the Crown,) and the executors of *Dawes*, the prosecutors of this rule.

The rule discharged [1].

[17] *Rex v. Bishop of Chester*, B. R. M. 27 Geo. 3. 1 Term Rep. 396.

[†111] *Vide Burgess v. Wheate*, *Canc.* 1759. 1. *Blackst.* 123.

[1] A special action of *assumpsit* was afterwards brought by the executors, against the Governor and Company of the *Bank*, which was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after *Hilary Term*, 21 Geo. 3. Upon the trial, it was admitted that *Lydia Fennymore* died in the *Foundling Hospital*, in the testator's [527] life-time; and it was proved that *Dawes* was reputed to be a natural son of *Lascelles*,

and that he had no next of kin. It also appeared, that the *Foundling Hospital* had succeeded in obtaining a grant from the Crown of the stock in question. A verdict was found for the plaintiffs, but with leave to move the court, that a nonsuit, or verdict for the defendants, might be entered. Accordingly, in *Easter Term*, 21 Geo. 3. the *Attorney General* obtained a rule for that purpose. It seems it is customary for the Crown to grant to the *Hospital* such property as would have belonged to foundlings who happen to die there. The grant, in this case, was in the form of a warrant, under the sign manual, authorising *George Whalley*, Esq.

of the *Foundling Hospital*, to call upon the plaintiffs, as executors, for a transfer of 1000*l.* and for an account and payment of the residue of the personal estate and effects of *Dowes*, and to receive the same for his Majesty's use, (*vide Megis v. Johnson, infra, 542.*) In consequence of this authority, *Whalley*, before the trial, had filed a bill in Chancery, praying an account

against the plaintiffs, and an injunction to be directed to the *Bank*, to restrain them from transferring the stock to the plaintiffs. Pending the rule for setting aside the verdict, a compromise took place, so that it was never argued.

1780.

The KING
against
The BANK
of ENGLAND.

SYERS and Others against BRIDGE.

Friday,
24th Nov.

ACTION against an underwriter, on a policy of insurance on the ship *Mary*, a letter of *marque*. The words of the policy were, "At and from *Liverpoole* to *Antigua*, with liberty to cruise six weeks, and to return to *Ireland*, or *Falmouth*, or *Milford*, with any prize or prizes." The ship having been taken, this action was brought, and came on to be tried, at the last assizes for the county of *Lancaster*, before *HOTHAM, Baron*, when a verdict was found for the plaintiffs, but with liberty to the defendant to move for a new trial, without payment of costs.

A liberty "to cruise six weeks," in a policy of insurance, means "six weeks successively, from the commencement of the cruise."

On *Thursday*, the 9th of *November*, *Macdonald* obtained a rule to shew cause, why there should not be a new trial; and, to day, the case was argued, by the *Attorney General*, *Dunning*, and *Davenport*, for the plaintiffs, and *Macdonald*, *Lee*, and *J. P. Heywood*, for the defendant.

Upon the Judge's report, the evidence given at the trial appeared to be as follows: The policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or the duration, of the voyage. The captain, being called on the part of the plaintiffs, swore that he, in fact, sailed from *Liverpoole* on the 28th of *February*; he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of *March*, chasing, however, at different times, from the 7th to the 14th, when he began his cruise, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of *March*, he continued cruising about the same latitude (43), till the 17th or 18th of *April*, when he discontinued the cruise, of which he also gave notice, intending to go to the *Burlings*, off *Lisbon*, in the course of his voyage. On the 23d, he renewed the cruise, of which he gave notice, as before, and ordered a minute, to that purpose, to be entered in the log-book. From that time he continued cruising till the 28th of *April*, when he was taken by an *American privateer*. Two or three days before

[528]

1780.

SYERS
against
BRIDGE.

fore he sailed, he met with *Kenyon*, the broker who had got the policy subscribed, in the counting house of the plaintiffs, who, in discoursing about his liberty to cruise, said he might do so in any latitude he chose, and that if he had no success in one place, he might leave it, and proceed to another, and there begin cruising again, mentioning when he should begin, and leave off, in his log-book; and that if such separate times of cruising should not, when added together, exceed the space of six weeks, the terms of the insurance would be complied with. None of the under-writers were present at this conversation; but the captain said, he considered *Kenyon* as acting for them, as well as for the insured. His log-book was taken, but he produced a journal, which he and his clerk had copied from the log-book. He said, he understood the meaning of "*cruising*" to be, delaying the course of the voyage, in any particular latitude. The second witness produced by the plaintiffs had been captain of a letter of *marque* in the last war. He defined "*cruising*," a delay of the voyage, under a fair wind to the port of destination. He had examined the journal, and was of opinion, that there had been no delay in the voyage, except at the times which the captain had expressly appropriated to the cruise: It is the custom for letters of *marque* which have not liberty to cruise, to chase, when they fall in with an enemy's ship: He was never cautioned against it, and had chased frequently under such circumstances. In like manner, without such liberty to cruise, it is customary, and permitted, to letters of *marque*, to go three or four points out of the direct course, for the purpose of speaking to ships, and he did not consider any of the acts done by the captain, before the 14th of *March*, as *cruising*.—The defendant's counsel read several entries from the journal, to shew different instances of chasing, and quitting the direct course to speak to ships, between the 7th and 14th of *March*. They then called a witness, who had also commanded a letter of *marque*, during the last war, and who swore, that he thought the ship, by what appeared from those entries, was to be considered as *cruising* between the 7th and 14th. The counsel for the defendant called several other persons; two of whom were brokers. His witnesses concurred in thinking, that, by the terms of the policy, the cruise must be six successive weeks, not interruptedly, and at intervals.—The two witnesses examined on the other side thought, on the contrary, that the policy did not import any such restriction; but they admitted, on the one side and the other, that they only spoke their opinion, and could say nothing of any usage, none of them having ever known a case circumstanced like the present.

[529]

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The defendant, upon the above evidence, set up a two-fold defence: 1. If the cruise was to be considered, as having been continued from the 7th, instead of from the 14th of *March*, to the 17th or 18th of *April*, then the ship had cruised above six weeks, at different intervals, and consequently the terms of the policy had been departed from: But, 2. If the jury should not be of that opinion, still, from the words of the policy, as well as the nature of the thing, the six weeks were meant to be successive, and uninterrupted, and therefore expired at the end of six weeks computed from the 14th of *March*.

The judge declined giving any direction, or opinion on this last point, it being agreed that the opinion of the court should be taken upon it.

1. In support of the verdict, it was, now, contended, on the first point, that it was a question of fact, proper for the decision of the jury, when the cruise began. The captain had positively sworn that it did not commence till the 14th, and the jury had believed him. As to chasing an enemy's vessel which appears in view, or going a little out of the course to speak to a ship, that is never considered as a deviation, in the case of a letter of *marque*. It is what they always do, and, it being known to the under-writers that this was a letter of *marque*, no express licence, or stipulation, was necessary, to protect her in that respect. But, if a letter of *marque* quit the direct course of the voyage on purpose to look for prizes, that is a deviation, unless she is protected under a particular licence; for the difference, and the only difference, between a letter of *marque* and a *privateer*, is, that the sole object of the latter is cruising, the principal object of the former a trading voyage. 2. The natural construction of the licence in the policy is, that six weeks, no matter how made up, may be enjoyed in cruising. Suppose, on the second day of the cruise, a prize had been taken, and carried back to *Milford, Falmouth, or Ireland*; can it be contended, that the time employed in bringing the prize into port, must have been computed as part of the six weeks? The broker's construction ought to bind both parties; he is a sort of middle man, equally the agent of the insurers and insured. Besides, in this case, *Kenyon* was actually in partnership with one *Slater*, as a broker, and this very *Slater* was an under-writer on the policy.

On the other side, the counsel contended, that a great deal of inadmissible evidence had been received. That the question, whether the six weeks were to be successive, was a mere point of construction on the words of the policy, and the opinion of *Kenyon*, or the witnesses, ought not to have been given in evidence. If indeed there had been proof of any general usage, that would have been admissible,

1780.

SYMS
against
BRIDGE.

[530]

1780.

SYES
against
BRIDGES.

admissible, but nothing of that sort was attempted. If the plaintiffs construction were to prevail, a captain might watch occasions when the wind was directly in his teeth, and then declare that he stopped cruising, and was to be considered as pursuing his voyage.—They said nothing on the first point.

Lord MANSFIELD, — This was merely a question of construction, on the face of the policy, and, unless an usage could have been shewn in favour of this desultory cruising, calling witnesses to support it, was calling them to swear to mere opinion. None of those produced knew of any instance, and, therefore, their evidence ought not to have been received. Yet, I dare say, their testimony had great weight with the jury. The meaning of words depends on the subject. The instructions were not read, but they shew the meaning very clearly, for they run thus, “To cruise six weeks, and then proceed to *Antigua* [1].” There can be no general rule. Here, the subject-matter, in my opinion, is decisive to shew that the six weeks meant one continued period of time. A cruise is a well known expression for a connected portion of time. There are frequently articles for a month’s cruise, a six weeks cruise &c. Such a liberty as in this case, to a letter of *marque* is an excuse for a deviation. But what is contended for by the plaintiffs is impossible in practice. Suppose the ship returns *directly back*, cruising for the space of a week she may then take perhaps three weeks to return to where she had been. Can she then renew the cruise, and return again, and so repeatedly? The voyage, in that way might last for years. But the true meaning is, “I will excuse a deviation for six weeks.” The instructions although it happens that they were not read, strike me much. Another argument: Six weeks is a continuation a congregate denomination of time. If they had meant separate days, they would have said 42 days.

The rule made absolute.

[1] They were in court, and had been stated by the counsel for the defendant.

Friday,
24th Nov.

The KING against ROUTLEDGE.

A college barber at *Oxford*, though he resides in the city out of college, is intitled to the privileges of the university. — *Qs.* Whether, under that right, he is exempt from serving the office of constable for the city.

AN indictment having been found against the defendant, at the quarter-sessions for the city of *Oxford*, for refusing to take upon himself the office of constable for one of the wards in that city, it was removed, by *certiorari*, into this court, and came on, for trial, before BULLER, *Justice*, at the last summer assizes for the county of *Oxford*, on Friday the 28th of July 1780.

The indictment contained two counts. The *first* stated, generally, that the defendant being an inhabitant, and residing in the ward in question, was on, &c. *lawfully and in due manner elected, nominated, and appointed* by J. T. alderman of that ward, and one of the justices for the city, into the office of constable, for the said ward; that he afterwards had notice of the appointment, and was summoned to appear before K. J. and E. T. two other justices of the city, to be sworn in. The *second* count alleged, particularly, that Oxford is an ancient city, that, from time immemorial, there had been accustomed to be four aldermen of the said city, and that each of such aldermen should and might, on the 30th of *September*, every year, (or the day following, if the 30th of *September* should be a *Sunday*,) elect and choose, and of right ought to elect and choose, a fit and able person, &c. to be constable, in and for the ward to which such alderman should respectively belong; that the said defendant was an inhabitant, &c. and a fit and able person, and that the said J. T. then was one of the aldermen of the said city, to wit, for the ward in question, and that on the said 30th day of *September*, in the year, &c. the said J. T. did duly and lawfully elect, choose, and appoint the defendant, &c. (Then stating the notice and summons, as in the former count, and concluding that notwithstanding the election and appointment the defendant refused to take the oath, &c.)

1780.

The KING
against
ROUTLEDGE.

[532]

The defence consisted, 1. In putting the prosecutors on proving the custom as laid in the second count of the indictment: 2. In shewing that the defendant, being matriculated in the university, and entered on the buttry-books of *Brazen Nose College*, as barber to the college, was not liable to serve as constable, although he resided, and kept a barber's and perfumer's shop in one of the wards of the city.

The evidence for the prosecution, with regard to the custom, was, that, on the 30th of *September*, (or the 1st of *October*,) annually, a meeting is held, in the town hall, of the mayor, four aldermen, and assistants, at which the new mayor is sworn in, and the city officers, viz. constables, &c. appointed; that, on such occasions, the hall is open to every body; that constables are never appointed but at that meeting; but that none of the members of the corporation ever interfere in their appointment except the aldermen, each of whom appoints one for his own ward; that this is done in the following manner: the old constable delivers in a list of all the persons in his ward fit to serve the office, and the alderman of the ward names one from that list.

With

1780

The King
against
ROSTLEDGE.

With regard to the liability of the defendant to serve, the prosecutors, after proof of the defendant's residence in the ward, and his keeping a shop there for perfumery, toys, &c. endeavoured to shew, that, in many instances, persons of a like description, *viz.* barbers, cooks, &c. of different colleges, had served the office. They had given notice to the defendant to produce the matriculation-books of the university, in order to prove the matriculation of those persons; but, as the books had not been inspected before, and there was no index, they were not able to find the names of any of them. It was admitted, on the part of the defendant that the *Vice Chancellor* of the university often directs his warrants to be executed by the city constables.

[533]

The defendant's counsel, on the question concerning the custom, read a clause in the charter of 3 Jac. 1. to the city of Oxford, by which it is provided, that constables, &c. of that city, in case of vacancies, shall be chosen by the mayor, &c. and *commonalty, or the major part of them*; "*de civibus civitatis prædictæ.*" They also read the constable's oath, by which he is bound to attend the city court, &c.

On the other head, they proved the defendant's matriculation in the university books; that he was barber of *Brazen Nose College*; and that an ancient fee is annexed to that office, which was regularly paid to him; that the office of barber is taken notice of in the statutes of the college; and that the defendant, if the members of the college chose, was bound to act as their barber, and, on one or two particular occasions in the year, to attend at the college as a servant; that he actually had regularly attended on those occasions, but was not then employed in the exercise of his trade as a barber. They then read a passage from a charter of *Edw. 4.* reciting a composition made between the university and the city in the reign of *Edw. 1.* as follows:

"Ad hoc etiam, quod prædicti major & burgenses
"queruntur, quod, cum per cartam domini regis non
"ceduntur aliquæ libertates alijs in prædictâ villâ, quam
"scholaribus universitatis prædictæ, et illi scholares sine
"exempti a communitate prædictâ ad respondendum coram
"eis, vel simul cum ipsis, de aliquibus rebus ipsius
"dominum regem vel communitatem prædictam tangentibus,
"prædicti cancellarius & scholares, per procuratores suos,
"alios sibi appropriant, et qui non sunt scholares, ut cissores,
"barbatores, scriptores, parcaminarios, & hujusmodi, qui non sunt
"de jurisdictione suâ, & qui habent, in eadem villâ, uxores,
"familiam, & mercandisas suas, & hoc ad grave damnum domini regis,
"et firmariorum suorum—Ad quod, per prædictum cancellarium
"cellarium

"cellarium & magistros, ac etiam per prædictos majorem
 "& burghenses, unanimiter est concordatum, quod, de
 "cætero, nullus gaudeat *libertatibus seu privilegiis univer-*
 "*sitatis prædictæ* nisi clerici et eorum familiæ et ser-
 "vientes, parcaminarii, *luminarii (a)*, scriptores, *barba-*
 "*tores*, & alij homines de officio, qui sunt de robis ip-
 "sorum clericorum."

1780.

The King
against
ROUTLEDGE.

They also produced an indenture, or sort of agreement, between the university and the city, in the 37th year of Hen. 6. 1459, by which agreement the city admitted, that the magistrates of the university were joint conservators of the peace, and the particular persons intitled to the *privileges of the university* were enumerated, and, among them, *barbers with their household*. There was, however, no evidence given to shew the extent of those privileges, or whether the exemption from serving the office of constable was included in that general expression. It appeared that the present corporate name was the same as in the charter of 3 Jac. 1. In a modern corporation book, beginning in the year 1776, the title of the entry of the meeting of the 30th of September, was—"For the election of officers,"—and nothing was stated in the book of any other business being done at such meeting. It mentioned nothing of the mode of electing the constables; the entry of the election of each being simply,—"*A. B.* was chosen constable for the ward of *C.* and sworn in."

[534]

After the evidence was closed, it was contended, at the trial, on the part of the defendant;—1. That the prosecutors had not proved the custom as laid. The presence of the mayor and assistants appeared to be necessary at the meeting, and it also appeared to be part of the usage that each constable should be named out of a list delivered in by his predecessor. But neither of those circumstances were laid as part of the custom, in the *second* count of the indictment. The usage, as proved, seemed, it was said, to shew, that the election was made according to the charter of 3 Jac. 1. not by any prescriptive right, for that, although the nomination for each ward was, *de facto*, left to the alderman of that ward, yet the meeting was open to the whole corporate body. (The counsel for the prosecution seemed, at the trial, to admit that the *first* count was too general, and could not be supported.)—2. It was insisted by the defendant's counsel, that, supposing the custom had been proved to exist as laid in the indictment, and that the appointment had been agreeable to the custom, still the defendant must be acquitted, because he was clearly intitled to the *privileges of the university*, and, as no instance had been shewn of a *matriculated* barber having served as constable for the city, the

(a) i. e. Illuminators of manuscripts. Hence probably the word "*Limner*."

1780.

The King
against
Routledge.

[535]

the exemption from that office ought to be considered as one of those privileges.

To these objections, it was answered;—1. That, as to the charter of 3 Jac. 1. it was out of the question, for that *Oxford* is a city by prescription, and it did not appear that the city had ever accepted that part of the charter relied on by the defendant. With regard to the variance between the evidence and the custom as laid, it was not material; it had not been said, by any of the witnesses, that the meeting was *necessary* to the appointment of constables; it was only proved that, in fact, they had been appointed at that meeting; but *that* was merely matter of convenience, because the aldermen must meet in the hall that day, in order to swear in the mayor.—2. The exemption claimed could not be supported on the indefinite and general expressions in the ancient instruments which had been read, especially as the defendant was merely a colourable servant of a college; and others, who, *de facto*, stood in similar predicaments had been proved to have served the office.

BULLER, *Justice*, in summing up to the jury, said, there were two distinct questions in the case, perfectly independent of one another, and he would take their opinion separately on the first, because, if that opinion should be one way, it would become unnecessary for them to consider the other question. He then said, that, if the practice was at all reconcileable to the charter, *that* must be taken as the authority and rule for the appointment of the constables; and that it seemed to him, that the nomination by the aldermen might be consistent with an election by the mayor, &c. and commonalty. It was not denied that *part* of the charter had been accepted; the present corporate name was that given by the charter; and he was inclined to think, that a charter must be accepted in *toto*, if at all [1]. There was no *list* mentioned in the indictment, yet *that* was proved to be an invariable part of the usage. The entries in the book, relative to the meeting, seemed to shew, that the chief, if not the only, purpose, was the election of officers. Upon the whole, he inclined strongly for the defendant, on this head.

The jury, however, which was special, but consisted chiefly of *tales* men, found this question for the prosecutors.

The judge afterwards stated, and observed upon, the evidence on the head of the exemption; and seemed to think,

[1] *Vide Rex v. Cambridge*, E. 5. Geo. 3. 3 Burr 1656. 1661. 1663. where it is held, that a new corporation must accept a charter in *toto*, or not at all; but that one already existing may ac-

cept one in part. For the doctrine concerning the acceptance of charters, *vide Rex v. Amery*, H. 27 Geo. 3. 1 Term Rep. 575 to 590. & S. C. on a writ of error in Dom. Proc. 30 Geo. 3.

think, that it was to be presumed that this was comprehended in the general word "*privileges*," unless the contrary had been shown.

The jury, however, found this question also for the prosecutors; and there was a general verdict against the defendant.

On *Thursday*, the 9th of *November*, *Bearcroft* obtained a rule to shew cause, why a new trial should not be granted, and, this day, the case was argued, by the *Attorney General*, *Howorth*, *Durning*, and *W. Jones*, for the prosecution, and *Bearcroft*, and *Th. Milles*, for the defendant.

In support of the verdict it was contended: 1. That, supposing there was a material variance between the evidence and the *second* count, yet the *first* count was sufficiently particular, and might well be supported: 2. That the variance between the evidence and the second count was not material; there was no proof that the presence of the mayor and commonalty was a *necessary* part of the custom, nor that the aldermen might not nominate persons not contained in the old constable's list; and, upon the whole, the evidence on this head was sufficient to be left to a jury: 3. That it was too violent a presumption to imply, that, under the general expression of "*privileges of the university*," this exemption was included. In every case of the parish-offices, which are of general utility, all inhabitants householders are liable to serve, unless there is an *express exemption*. There might be some reason for such a claim, by those servants of colleges who are bound to constant attendance, but this man was little more than a nominal servant, and belonged much more to the city than to the university. However, the office of constable is of such a nature as to be equally beneficial to the university as to the city, and, therefore, there is no very good reason why any member of either body should be exempt from serving. It was, moreover, proved at the trial, that several college barbers had served the office: It is notorious, that *all* college servants are matriculated: Therefore, though the entries of the matriculation of those men had not been found, the jury might fairly presume, that they had been matriculated. If they were, those instances completely overturn the pretended right of exemption.

For the defendant, it was insisted,—1. That the *first* count, most clearly, could not be supported. Constables, by the common law, are appointable only at the court leet, or, in default of appointment there, by the conservators of the peace, or at the quarter sessions. A corporation, as such, has no right to appoint constables. They must intitle themselves to it, under some particular prescription,

1780.

The KING
against
ROUTLEDGE.

[536]

1780.

The King
against

ROUTLEDGE.

[537]

or grant. Hence, in indictments of this sort, it is held indispensably necessary, that such grant, or prescription, should be alleged, and plainly set forth; 2 *Hawk, Pl. Cr* 2. 10. § 46. *Rex v. Vaws (a)*, *Rex v. Barnard (b)*.—*c.* As to the variance between the evidence and the custom laid in the *second* count, it is material and fatal. By the custom *proved*, the persons eligible are limited to the constable's list; by the custom *laid*, there is no such restriction. According to *the evidence*, the appointment must be in a corporate meeting; according to *the indictment*, no such meeting is requisite.—3 As to the exemption there is no distinction to be made between the defendant's case and that of the highest members of the university; he is intitled, like them, to the *privileges* of the university, and therefore the question on this head comes to be, Whether every member of the university is liable to serve this office? The counsel for the prosecution feel the absurd extent of the proposition when stated in this manner, and, therefore, would distinguish the defendant from other members of colleges by the circumstance of his non-residence; but it is a notorious fact, that none of the servants of colleges reside within the college, except the porter. Are no servants, but the porters, intitled to the university privileges? Every college is situated locally in some of the wards of the city, and, therefore, every inhabitant of a college is also an inhabitant of the city, so that the exemptions which members of colleges enjoy must be personal privileges, not at all depending on their not inhabiting in the city. The privileges, by the agreement in the reign of *Hen. 6.* extend to barbers *with their household*. This expression goes very strongly to shew that persons of the defendant's description are intitled; for barbers with their *household* cannot be supposed to have lived within the walls of a college. The following reasons evince that the exemption claimed by the defendant is among the privileges common to all members of the university. 1. That the university has a court-leet is well known, and appears by the case of *Rush v. The Chancellor & Scho'ars of Oxford*, in *Salkeld (c)*, as well as by the Statute of 13 *El. c. 29.* which ratifies, to both universities, "all liberties, &c. *letes*, *law-days*, &c." Now the appointment of constables is incident to every court-leet. 2. The magistrates of the university are conservators of the peace, and to such the office of constable is necessary and subservient. 3. Every matriculated person is one of the homage of the university court-leet, and liable to be appointed a constable there, and it is said by *Hawkins* the

(a) *B. R. M.* 21 *Car.* 2. 1 *Mod.* 24.(b) *B. R.* *H. 9 Will.* 3. *Comb.* 416.(c) *B.* *K. T.* 1 *Ann.* 1 *Salk.* 34

no man can be of two leets (b). Much less can the same person act, at the same time, as the officer of two different jurisdictions. Yet, if this exemption does not exist, a member of the university may be appointed a constable both by the city and the university. Many instances might be cited in which the court has expressly held persons to be exempt from serving this office, because it was incompatible with their other duties: as *attorneys*; because they are attendant on the courts of justice; *Prouse's Case* (c): and *aldermen of London*; because they ought to be resident in that city, and are fineable if absent; *Abdy's Case* (d).

Lord MANSFIELD, — I am well persuaded the reason which induced the counsel for the city to waive the *general* count, at the trial, was, that they knew it could not be supported. With regard to the custom laid in the *second* count, the circumstance of the list is an essential variance. The alderman cannot appoint, *ad libitum*, any one of his ward: he is confined to the return made by the former constable. As to the exemption, the university has a separate jurisdiction established by ancient wisdom, and it is essential to its happiness and peace that this should continue. The body of the university has always been kept distinct from the city at large; and I believe every university in the world is so constituted. Who is it, in this case, that claims the exemption? A servant of the college, named in the statutes, with an ancient fee, and duties which require attendance and service in the college. All colleges have servants of this sort. For many years, I had the honour of being counsel to one of the colleges, and had an ancient fee annexed to my office. It seems admitted, that, if the defendant resided within the walls of the college, he would be exempt. But it is certainly true, that none of the servants but the porter do live within the walls. Besides, the agreement with the city, which declares that the privileges extend to barbers *with their household*, overturns such a distinction. In short, the defendant seems to be a fully privileged person. I think the verdict, on both points, contrary to evidence.

The rule made absolute [1].

(b) 2 Hawk. c. 10. § 12.

(c) B. R. M. 10 Car. 1. Cro. Car.

389.

(d) B. R. T. 16 Car. 1. Cro. Car.

589.

[1] There has not yet been any new trial had, (Vacation after T. 22 Geo. 3.)

1780.

The King
against
ROUTLEDGE.

1780.

Saturday,
25th Nov.

An officer or sailor who has engaged to serve on board a letter of *marque*, for certain wages during the voyage and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she compleats her voyage, although he shall have been lent from the ship before the capture, as prize-master on board a prize taken in the course of the voyage.

ABERNETHY *against* LANDALE.

THIS action was tried before BULLER, *Justice*, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case which, (as far as is material,) stated:—That the defendant was captain of a ship called the *Winchcombe*, which was provided with *letters of marque*, and was to cruise for three months [2], and then proceed to the coast of *Africa*, and from thence to *America*: that the plaintiff, in consideration of 5*l.* by the month as wages, and of certain shares of all prizes which should be taken by the *Winchcombe* in the course of the cruise,—entered on board the ship, as second lieutenant, and subscribed certain articles, by which, among other things, it was agreed between the defendant as captain, and the plaintiff, together with several other persons, as the officers and crew of the ship; that the plaintiff, as second lieutenant, and the said crew, should repair on board, and proceed in the ship, and duly serve, in their several capacities and stations, in her then intended voyage from *London* to the coast of *Africa*, and at and from thence to such place or places in *America* as the said master, or other master or masters for the time being, should direct, and from thence back to the port of *London*, or some other her discharging port in *Great Britain*: and that the wages or monthly pay to grow due to the said officers, sailors, and others belonging to the said vessel, for their service on board thereof that present voyage, should be paid to, and accepted by them, in the manner following; *viz.* one half part thereof at the port or places of the delivery of the negroes in *America*, and the remaining part thereof, and also the wages which should afterwards become payable within 30 days next after the ship's arrival at her port of discharge in *Great Britain*: That the ship sailed from *London* on the 25th of *May*, 1779, and on the 1st of *August*, took a *Spanish* vessel, of which the plaintiff was appointed prize-master: That he carried her into *Lisbon*, where he continued, till *January* following, in the care of the prize and her cargo, and till the same were disposed of by the agent appointed by the owners of the *Winchcombe*, and afterwards took his passage to *England*, and arrived on the 15th of *February*: That the *Winchcombe*, on the 3d of *September*, was taken by two *Spanish* men of war, in her passage to the coast of *Africa*, after the time limited for cruising, and before her arrival at the port or place of delivery of the negroes in *America*, mentioned in the articles, or at

[540]

[2] *S. fra, Syers v. Bridg, p. 527.*

her discharging port in *Great Britain*, or at any other port whatsoever.

1780.

The question stated for the opinion of the court was, *ABERNETHY* whether the plaintiff was entitled to recover (38 l. 7 s. 8d.) the whole of the sum demanded by the action [1], or any part of it? The case was argued on *Tuesday*, the 14th of *November*, by *Baldwin* for the plaintiff, and *Erskine*, for the defendant, against *LANDALE*.

For the plaintiff, it was contended, that the *justice* of his demand could not be disputed, since he had continued in the defendant's service till his return to *England*. He did not desert the ship, but left her by the command of the defendant. It is indeed laid down as a general maxim, That freight is the mother of wages; but the reason of that maxim is, that the sailors may have an interest in the safety of the ship, and may be thereby induced not to leave her in cases of danger, but to exert themselves in her defence; but, here, as the plaintiff had, by the orders of the captain left the ship, he could not act at all in her defence, and therefore the reason does not apply in the present instance. The rule is certainly not universal, and without exception. If the ship is seized for debt, or for having contraband goods on board, it has been held that the sailors have a right to their wages up to the time of the seizure, because, though the voyage was never completed, that was owing to the act of the owners, and not to any negligence of the crew.

On the other side, it was insisted, that, as the ship was taken before any freight had been earned, the plaintiff could recover nothing for wages. If a mariner is discharged he is entitled up to the time of the discharge, although the ship afterwards be lost, but here the plaintiff never was discharged. With regard to all questions concerning wages, the officers and common mariners are exactly on the same footing; as was held in the cases of *Hooke v. Moreton* (a), and *Baily v. Grant* (b). If the plaintiff had arrived from *Lisbon* before the arrival of the ship, and she had afterwards arrived safe, he, as well as the officers and crew on board, would have been entitled to wages up to the arrival; for he continued to belong to the ship, and was still subject to the same conditions with the rest of the crew. But suppose he should be thought to have acted in another capacity than as one of the crew, when he was employed in taking care of the prize, his remedy is not by proceeding for wages under the articles, (which was the only point gone into at the trial,) but he ought to bring an

[541]

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action,

[1] Being at the rate of 5 l per month from the day the ship failed, to that of the plaintiff's return to *England*.

(a) *B. R. M. 10 Will. 3. 1 Ld. Raym. 397.*

(b) *B. R. 11, 12 Will. 3. 1 Ld. Raym. 632.*

1780.

ABERNETHY
against
LANDALE.

action, upon a *quantum meruit*, for work and labour. The court cannot now ascertain or apportion what he may be entitled to in that respect.

Baldwin, in reply, observed, that the sum might be easily apportioned. If the court should think the plaintiff entitled to wages for the time he was on board the ship, those wages would be calculated in the proportion of 5 *l.* per month, and, as there was a general count in the declaration upon a *quantum meruit*, he might under that count, recover likewise what he earned during the time he had the care of the prize, which it would be reasonable also to allow at the rate of the stipulated monthly wages.

Lord MANSFIELD said *Baldwin's* distinction seemed equitable, but that he thought it would be difficult to draw such a line, for that, after the plaintiff went on board the prize, he must still be considered as belonging to the *Winchcombe*.

Dunning, on the same side with *Erskine*, observed, that this ship had two characters, one, *that* of a privateer, the other, *that* of a merchantman. That, in like manner, the plaintiff had two characters, the one, as an officer of a privateer, the other as belonging to a merchantman. In the first character, no wages were due to him. The chance of a share in prizes was the consideration for serving in that capacity; and the plaintiff had in fact received that consideration; and, if the ship had taken more prizes, his gains would have been proportionably increased. As belonging to the ship in her capacity of a merchantman, he must be subject to the general rule, and no freight having been earned, no wages were due.

The court took time to consider, and, as the case did not state the whole of the articles, Lord MANSFIELD directed a full copy to be sent him. It appeared, however, that nothing material had been omitted.

This day his Lordship delivered the opinion of the court to the following effect.

[342]

Lord MANSFIELD, — As a sailor on board a ship on a trading voyage, the plaintiff is entitled to nothing; for freight is the mother of wages, and the safety of the ship the mother of freight. The plaintiff's counsel endeavoured to support his case on another ground, and contended, that he was entitled to a sum equal to his wages, upon the *quantum meruit*, for the care of the prize. The ship was a *letter of marque*, and, before her voyage, was to cruise for three months. All the crew were to share in what prizes might be taken, in certain proportions; and it is admitted that the plaintiff has had his share of the prize which was actually taken. The question then is, whether he can now make any demand, in the nature of wages, for the time he had the care of the prize; and the light in which it strikes us, is this. The ship sets out in a double capacity; she is

to perform a trading voyage, and to carry negroes from Africa to America; but, before that, she is to cruise for three months as a privateer. All demand on account of the trading voyage is gone. But, in her character as a privateer, the crew are entitled to no wages. They all run equal risks, and take their chance of their respective shares in prizes.

The *possea* to be delivered to the defendant.

MEGIT *against* JOHNSON and Another, Administrators of LOWE.

1780.

ABERNETHY
against
LANDALE.

Saturday,
25th Nov.

ACTION of debt on a bond — The plaintiff, in his declaration, averred, that, after the death of *Lowe* the obligor, administration of the goods and chattels of the said *Lowe*, at the time of his death, was duly granted to the defendants. — To this the defendants pleaded; 1, That such administration was not granted to them; 2. *Non est factum*; 3. That they had fully administered. — On the two first pleas issue was joined. To the third, the plaintiff replied; That on the 23d of January 1780, the defendants had divers goods and chattels, which were of the said *Lowe* at the time of his death, in their hands to be administered, with which they might have satisfied the plaintiff's debt. — Upon this replication issue was also joined.

The cause came on for trial, before Lord MANSFIELD, at Guildhall, at the Sittings after last Trinity Term, when a verdict was found for the plaintiff, subject to the opinion of the court on a case reserved. The case stated; that the plaintiff's demand arose on a bond given him by *Ralph Lowe* deceased, dated the 6th of January 1775, in the penal sum of 240*l.* conditioned for the payment of 120*l.* and that on this bond there was due to the plaintiff, at the time of the trial, the sum of 142*l.* It then set forth an inquisition taken on the body of *Lowe*, before the coroner of Liverpoole, on the 10th of April 1779, by which, upon the view of the body, and the testimony of witnesses, it was found, that he, being confined in the gaol of that place on a charge of felony, had taken a large quantity of *laudanum*, on purpose to poison himself, and that he was *felo de se*. The case then set forth three other exhibits, viz. 1. A memorial by the defendants, as treasurers of the society called "The Amicable Contributionship, or Hand-in-Hand Office, for insuring houses and buildings from fire," to the commissioners of the Treasury. 2. A warrant, under the sign manual, in consequence of this memorial, directed to the advocate, and procurator general, or either of them. 3. Letters of Administration granted thereupon

The effects of an intestate having vested in the crown by forfeiture, if letters of administration are granted to A. in consequence of a warrant from the king, and they run in the usual form, viz. "To pay debts, &c." but with this additional clause, "For the use and benefit of his majesty." A shall be answerable as administrator for the debts of the intestate, and shall not be permitted to give evidence tending to question the validity of the letters of administration.

* [543]

1780.

MEGIT
against
JOHNSON.

[544]

thereupon to the defendants, by the archbishop of *Canterbury*. The substance of the *memorial* was ; that *Lowe* had insured, at the office of the defendants, the sum of 2350*l.* on a building called the *Emanuel* hospital for the blind, in *Kentish Town*, and that the landlord of the building had also ensured 1200*l.* upon it ; that, afterwards, the building was consumed by fire, and suspicions arising in the minds of the directors, that this happened by the malicious and wilful act of *Lowe*, they had taken great pains to discover the truth, and bring him to justice, and, having received abundant circumstantial evidence of his guilt, they procured a warrant for apprehending him ; that he was taken at *Liverpoole*, and committed by the mayor, to the goal of that place, to be conducted to *London* the next day ; but, that, to avoid public justice and disgrace, he poisoned himself, and died a few hours after his commitment ; that, upon the inquisition before the coroner, he had been found *felo de se*, and was sentenced to be, and accordingly was buried in the king's highway ; that he died possessed of a considerable personal estate, particularly, 700*l.* capital stock, three valuable leasehold houses, besides furniture and other effects, which the memorialists were informed, had been, or were about to be, seized for the king's use ; that the landlord of the hospital had demanded the 1200*l.* of the office, and that they thought themselves bound to pay it, and intended so to do ; and that, in prosecuting the enquiry and apprehending *Lowe*, the office had expended 90*l.* 7*s.* 6*d.* they therefore prayed, that they might be paid the said sums of 1200*l.* and 90*l.* 7*s.* 6*d.* out of the estate and effects of the said *Lowe*, or such parts of the said sums as to their Lordships should seem meet. The material part of the *warrant* was as follows : " We do hereby command, that " you appear on our behalf before the prerogative court of " *Canterbury*, and assert our right to the said personal " estate, and effects of the said *Ralph Lowe*, and there- " upon obtain letters of administration, for our use, unto " (the defendants,) they giving good and sufficient security, " for their duly administering and accounting to us for the " same." The letters of administration were, in all respects, in the usual form and words, except, that after the concluding clause, *viz.* " And we do, by these presents, ordain, depute, and appoint, you administrators of all " and singular the goods, chattels, and credits of the said " deceased," these words were added, " For the use and " benefit of his majesty." After these exhibits, the case proceeded to state, that the defendants had received, under the above circumstances, from the effects of *Lowe*, the sum of 1134*l.* 19*s.* 1*d.* and no more, and that, before the commencement of this action, they had paid the landlord of

of the hospital, 1205*l.* 5*s.* on his said claim, and had expended 90*l.* 7*s.* 6*d.* in prosecuting the aforesaid enquiry, and in the apprehending of *Lowe*.

If the court should be of opinion that the plaintiff, under the circumstances, was entitled to recover, a verdict was to be entered for him, with 1*s.* damages, and 40*s.* costs, and the *posse* to be indorsed, "That the defendants had "possessed assets of *Lowe*, sufficient to satisfy the plaintiff's "demand." If they should think he was not entitled to recover, then a nonsuit to be entered.

The case was argued on *Friday*, the 24th of *November*, by *Rooke*, for the plaintiff, and *Davenport*, for the defendants. The court desired *Davenport* to begin.

He argued to the following effect.—As it appears that *Lowe* was *felo de se*, by the record of inquisition, that is conclusive evidence of the king's right, against all the world. There was a time in this country, when the crown had an immediate right to the effects of intestates, without the interposition of the ordinary, or metropolitan. This at least is laid down by Lord *Coke*, in *Hensloe's Case* (a). It is true the doctrine of that case is denied in *Manning v. Napp* (b). But, whether the law was so, or not, makes no difference in the present case; for, as the party died *felo de se*, the whole vested immediately in the crown, and the king might have taken possession of the effects by the ordinary process of extent, so that the letters of administration are to be considered as mere waste paper. I suppose, however, that, in practice, it has been thought necessary, since the case of *Manning v. Napp*, for the crown to take the assistance of the ordinary, in appointing proper persons to collect, but such persons can have no authority to administer the effects. Being forfeited, they are not the subject of administration. Before the statute of 13 *Edw. 1. st. 1. c. 19.* the ordinary could neither sue, nor be sued. If he got possession of the intestate's effects, he might keep them. By that statute, he was rendered liable for the debts of the intestate, as far as the goods should extend; and, by 31 *Edw. 3. stat. 1. c. 11.* he was made compellable to grant administration of the intestate's goods, to his next, and most lawful friends, who were thereby authorised to sue for debts owing to him, and subjected to suits for what he owed. But, in this case, could the ordinary have been sued under the statute of *Edw. 1.* or compelled to grant administration under that of *Edw. 3.*? The intestate left no effects to be administered. The defendants are merely receivers. They cannot be sued, nor have they any right, under the letters of administration, to retain for any debts due by the intestate to themselves. It was absurd to make out the

1780.

MEGIT
against
JOHNSON.

[545]

(a) T. 42 El. 9. Co. 38. b.

(b) B. R. T. 4 W. & M. 1. Saik. 37.

1780.

MEGIT
against
JOHNSON.

[546]

the letters of administration in the usual form. However, the *additional* clause, properly, directs the defendants to act for the use and benefit of his majesty. The effects vested completely in the crown by the forfeiture, but as the insurance office suffered a material injury by the very act in consequence of which the forfeiture took place, they had a fair *equitable* claim, and they have received an authority to collect. But still the *strict* right is reserved; and the crown may dispose of the effects, when collected, as it thinks fit. Because it was held, in the case of *Manning v. Napp*, that the king could not grant such an authority by letters patent, the practice has been, for him to send to the ecclesiastical court, and to have a deputy appointed to collect the effects, for his behalf. It would be strange, if this assertion of his right should be construed to divest that very right, and to entitle the creditors to what by law belongs to the king. This action is founded on the supposition, that the defendants are liable to the debts, in consequence of the letters of administration; but the complete answer is, that no letters of administration have been granted to the purpose, and which have the effect, of making them answerable for the debts. If the plaintiff has any equitable claim, if he is entitled to favour, he should apply by petition, as the defendants have done. This action is founded upon a claim of *strict* right, and, if it is supported, the King will lose one of his great prerogatives, and the title of the crown found of record, by the inquisition, be divested by the act of the ecclesiastical court [†112].

Rooke,—This is not a new practice. It is of course for the treasury to assist parties in such cases, when they can shew such an equitable right. I admit that the crown does not take the goods of felons subject to their debts. But although, by the prerogative, the property vests in the king discharged of all demands, I insist that he may waive and that in this case he has waived, his prerogative in the respect. He may exercise the prerogative of mercy, in regard to forfeited property, as well as life. Though the branch of the revenue, by the civil list act, makes part of the *aggregate fund*, yet an express power of disposing of is reserved (a). As the power is undoubted, the only question is, in what manner it has been exercised in the present instance. Now it seems to be clear that the crown has directed administration to be granted for the general benefit of the creditors, reserving a right to dispose of the surplus; which no doubt was intended for the defendants. Is this inconsistent with law? Most certainly not. The ordinary is bound by statute to grant administration for the payment of the intestate's debts; but, even before any p

[†112] *Vide Wentw. Office of Executor*, 134.

(a) 1 *An. st. 1. c. 1. § 8.*

give direction by statute, he was bound *in conscience* so to do, and the chancellor would now, independent of any statute, compel him. Here, both the crown and the ordinary are concluded; the crown, by the sign manual; the ordinary, by the letters of administration. What was the intention of the crown, as it is to be collected from the proceedings? The letters of administration were granted upon the application of the king's advocate general, in consequence of a warrant from his majesty, and by them the defendants are, (in the usual form,) expressly directed to pay the debts of the intestate. The concluding words can only mean that they are to account to his majesty *for the overplus*. All parties interested have concurred in giving validity to the letters of administration; the king, by commanding his advocate to apply for them; the ordinary, by granting, and the defendants, by accepting, them.

LORD MANSFIELD asked, if there were many instances of this sort, (as had been alledged in the argument for the plaintiff,) and it seemed to be agreed, that it was common for the crown, in cases of outlawry, to grant a sign manual to the creditor who has prosecuted to outlawry.

His Lordship said, there was no doubt the justice of the case was with the plaintiff; but that there was a difficulty in point of law, *viz.* whether a right vested in the crown could be waved or relinquished in any other way but by matter of record. The king, his lordship seemed to think, could not, in point of law, resort to the ecclesiastical court for administration, the forfeiture having, *ipso facto*, vested the whole in him. But then he asked, whether the defendants, who had, *de facto*, accepted these letters of administration, could now object to them. They were not, he said, void on the face of them; and, if they had been granted irregularly, recourse should have been had to the ecclesiastical court to repeal them.

WILLES, and BULLER, *Justices*, were of opinion, that, by the acceptance of the letters of administration, the defendants were precluded from questioning their validity, and operation; and BULLER, *Justice*, thought that, for that reason, none of the evidence which tended to impeach them ought to have been received at the trial.

ASHHURST, *Justice*, concurred in thinking, that, if the letters of administration had been in the usual form, the defendants were, by their acceptance, bound not to question their validity. But he said, that the ecclesiastical court, in this case, had no inherent authority to interfere; that it was only authorised to act in consequence of the sign manual, and that, according to the terms of the sign manual, the administration was to be granted, without any qualification in favour of creditors, for the benefit of the crown, and the defendants were to give security that they would

1780.

MEGIT
against
JOHNSON.
[547]

[548]

1780.

MEGITT
against
JOHNSON.

would duly account to the crown. The ecclesiastical court, therefore, had exceeded its authority, and the letters of administration, in as far as respected the payment of the debts, were a mere nullity; and there was no occasion to apply for a repeal of them. He agreed, that the justice of the case was with the plaintiff, and that he had a good ground to petition to be paid before the defendants, but was afraid, that, if the court should decide that the ecclesiastical court could, by such an act, divest the property of the crown, a dangerous precedent might be established.

The court took time to consider till this day, when Lord MANSFIELD delivered their unanimous opinion, as follows:

Lord MANSFIELD, (after stating the case,)—Upon the whole of the facts, it was argued, by the counsel for the defendants, that the personal estate of *Lowe* was vested in the crown by forfeiture, in consequence of the suicide found upon record, and that this property could only be divested by matter of record, which letters of administration are not; that the plaintiff, therefore, had no right to recover against the defendants, but ought to apply to the favour of the crown. But we are all of opinion, on consideration, that these letters of administration are not void on the face of them. There are many instances where such administration may be granted for the king's use. Suppose *Lowe* had been a bastard, or, being legitimate, had died without any next of kin. The king, in such case, would have taken, as *ultimus hæres*, but subject to the debts of the intestate. Not being void, we think the court cannot, in this case, enter into the question, whether the letters of administration are voidable; and the ground of our opinion is, that the defendants, who have accepted and acted under them, shall not be permitted to deny their validity. That is *jus tertii*; and we are of opinion that the evidence on that part of the case ought not to have been admitted.

The *possea* to be delivered to the plaintiff.

[549]

Tuesday,
28th Nov.

The KING against WHITBREAD.

A *certiorari* will not lie to remove a conviction by the commissioners of excise for the double duties on beer.

A Rule had been obtained, in *Easter Term*, 20 Geo. 3. to shew cause, why a *certiorari* should not issue to remove a conviction, by the commissioners of excise, for the double duties on beer (a), into this court; and, in the same term, on *Wednesday*, the 26th of *April*, cause was shewn, by the *Solicitor General*, (*Wallace*,) and *Wilson*.—*Dunning*, *Davenport*, and *H. Cowper*, argued in support of the rule.

(a) Under 12 Car. 2. c. 24. § 33.

It was opposed on two grounds; 1. It was contended, that a *certiorari* would not lie, in any case, to remove proceedings before the commissioners of excise; 2. That, in this case, there were not sufficient reasons laid before the court to induce them to grant the *certiorari*, even if it would lie.

1780.

The KING
against
WHIT-
BREAD.

Against the rule, on the general question, it was said, that there was not a single example since the first establishment of the board, where such a writ had issued, although they try several thousand causes in a year. As the statutes had established a court of appeal, that was the regular course of redress, which the legislature had pointed out, if parties thought themselves aggrieved by the determination of the commissioners. *Ball v. Partridge* (a) was cited, as a case in which it had been held, that, when a jurisdiction is vested, by act of parliament, in commissioners, a *certiorari* will not lie, unless it appear that they have exceeded their jurisdiction.

On the other side, it was insisted, that the case of *Ball v. Partridge* had been often over-ruled [1], and the daily practice was against it. It was an authority incident to the court to remove every conviction, and this could only be taken away by express words. In many cases under the excise laws, the power of granting *certioraris* is expressly taken away, which is a strong argument to shew that, in all other cases a *certiorari* will lie. Thus, by 6 Geo. 1. c. 21. § 20 & 21. it is expressly taken away, in the cases there specified.—Several authorities were cited (b), but no clear instance of a *certiorari* directed to the commissioners of excise could be shewn.

[550]

The case stood over for the opinion of the court, which was delivered, this day, by Lord MANSFIELD, to the following effect.

Lord MANSFIELD,—Though great industry has been employed, no case was produced in which a *certiorari* has been granted to remove proceedings before the commissioners of excise. This circumstance alone affords a strong ground to suspect that none is grantable; for, in the multiplicity of business which occurs before them, it is natural to suppose, that some persons, dissatisfied, (whether right or wrong,) with their determination, would have wished to remove it before another tribunal. This has induced us to make further researches than the argument suggested, and to look very attentively into all the

(a) B. R. T. 18 Car. 2. 1 Sid. 296. *Rex v. Theed*, 2 Ld. Raym. 1375. 2

[1] *Rex v. Moreley*, T. 33 & 34 Str. 608. 8 Mod. 319. *Regina v. Townshend*, B. R. M. 1710, cited by

2. 2 Burr. 1040, 1042. (b) *Warwick, qui tam, &c. v. Cowper*, from a MS. note of Cowper, 4

State, Bunb. 106. *Rex v. Tindall*, 4 Justice. 2458. *Anon.* 1 Salk. 149. pl. 16.

1780.

The KING
against
WHIT-
BREAD.

[551]

the statutes on the subject. The statute of 6 Geo. 1. c. 21. has a clause, which was not observed upon at the bar, but seems very material. It is the 22d section. By the clause immediately preceding, (§ 21,) a *forfeiture* of brandy, arrack, rum, spirits and strong waters, is created in certain cases, and, in those cases, both appeal, and *certiorari*, are taken away. Then comes the section to which I refer, which inflicts a penalty upon the removal of sweets without certificate, and enacts that the sweets themselves, together with the casks in which they are contained, shall be forfeited, and liable to be seized by any officer of excise. It then goes on and says, "That every seizure and seizures of such sweets, &c. and also every other *forfeiture* and *forfeitures*, which from and after, &c. shall, or may be made, by virtue, or in pursuance of any act, or acts, whatsoever, relating to the duties of excise, or to any other duty, or duties, under the management of the commissioners of excise shall, and may be proceeded upon, heard, examined into, adjudged, and determined, by the same ways and means, and, in the same manner and form, as is, and are, herein, and hereby, prescribed, directed, or appointed, to be done, upon seizures of brandy, arrack, rum, spirits, or strong waters, not exceeding as aforesaid, and that such proceedings thereon shall not be liable to any appeal, or appeals, or to be removed by *certiorari*, any thing in this present act contained, or by law, statute, or provision, the contrary thereof notwithstanding." These words are certainly very comprehensive, and seem large enough to include the present case; for this is a *forfeiture* of double duty. In the information it is stated, that the said *Whitbread* hath forfeited double the value of the said rates and duties of excise and the adjudication is, That he do *forfeit*, &c. But besides that this is the natural construction of the words of the clause itself, such construction is greatly corroborated by the statute of 1 Geo. 2. st. 2. c. 16. § 3. which was made expressly for the purpose of obviating some doubts that had arisen upon the general penning of the act of 6 Geo. 1. This third section of 1 Geo. 2. c. 16. after mentioning the 22d section of the former statute proceeds thus: "In which clause some general words are mentioned, concerning other *forfeitures* to be made from and after, &c. by virtue, or in pursuance of any act or acts," &c. upon which words a doubt hath arisen whether, by the generality thereof, the right and liberty of appealing to the commissioners of excise from judgments given by the commissioners of excise in causes and prosecutions on account of forfeitures and offences relating to the duties of excise, and the jurisdiction

"dictio"

"diction and power of the commissioners of *appeals* to
 "hear and determine such appeals, and also the right
 "and liberty of *appealing* to the justices assembled at the
 "respective quarter sessions of the peace, in cases where
 "judgment or judgments happen to be given, by two
 "or more justices of the peace, in causes and prosecu-
 "tions before them, for, or on account of forfeitures,
 "and offences, respectively relating to the duties on malt,
 " &c. be not taken away, and repealed; now, for pre-
 "venting and avoiding all such doubts and questions,
 "and declaring and *re-establishing* the right and liberty of
 "appealing, in the respective cases before mentioned, be
 "it enacted, that neither the said act, nor any clause,
 "matter, or thing therein contained, did, or doth ex-
 "tend, or shall be construed to extend, or to have ex-
 "tended, to take away, repeal, or alter, the right and
 "liberty of *appealing*, in the respective cases before men-
 "tioned, or in any of them, and the right and liberty of
 "appealing in the respective cases before mentioned, and
 "the several jurisdictions and powers, as well of the com-
 "missioners of appeals, as of the justices of peace, assem-
 "bled in their respective quarter sessions, now, is, and are
 "and ought to continue, and be in the same plight and
 "condition, as the said right, liberty, jurisdictions and
 "powers, respectively was, and were, before the making
 "of the said act." It is observable on this clause of the
 "statute of Geo. 2. that, in speaking of the doubts, whe-
 "ther the right of appeal was not taken away, from judg-
 "ments by the commissioners, in cases of *forfeitures*, it adds,
 "and offences relating to the duties of excise," which shews,
 "that the legislature did not mean *specific* forfeitures only,
 "but also *pecuniary* forfeitures, and, by mentioning *appeals*
 "only, and not *certioraris*, (which are spoken of in the
 "same breath in the act of Geo. 1. and, if there was a
 "doubt about the one, there must have been the same
 "about the other,) it seems plain, that the legislature in-
 "tended, that *certioraris* should be taken away, and that
 "the right of appeal only should remain. That it was
 "thought such a distinction was proper, and that an *appeal*
 "ought to be preserved, in cases where the *certiorari* was
 "taken away, is plain, because, with regard to hides and
 "malt, respecting which the *appeal* is saved, by the statute
 "of Geo. 2. the *certiorari* is expressly taken away by 9 Ann.
 "c. 11. § 47. and 12. Ann. st. 1. c. 2. § 37 (a). As to the
 "cases which were cited at the bar, most, if not all of
 "them, are inapplicable to the present question. The
 "Anonymous case in *Salkeld* was before the statute of 1 Geo.
 "2. In *Warwick v. White*, the court of *Exchequer* took
 "cognizance

1780.

The King
 against
 WHIT-
 BREAD.

[552]

1780.

The KING
against
WHIT-
BREAD.

[553]

cognizance of the case, because the subject matter appeared to them not to be within the jurisdiction of the commissioners. In *Rex v. Tindal*, the application for the *certiorari* was on the part of the Crown, and the judges said, the King could not be precluded but by express words, and the King is not named; nor can it be supposed that he is within the reason for taking away *certiorari* in any case, viz. to prevent vexation and delay. The only case which seems to apply, is that of *Rex v. Theed*. That, indeed, was a case before justices of the peace, but the statute of 6 Geo. 1. extends to proceedings before them. It does not, however, appear that there was any litigation, in that case, about granting the *certiorari*, for the report mentions only the argument for, and against, supporting the conviction, and it is probable the prosecutor being advised that it might be maintained, (which was the decision of the court,) he did not think it worth while to object to the *certiorari*. We are all of opinion, that, in this case, a *certiorari* does not lie. But if it did, it must be granted upon cause shewn [1], and, as the *affidavits* in support of the present application, do not proceed upon any alleged want of jurisdiction, but contain objections to the conviction on the merits, the court would not grant the *certiorari*, if they had power to do it, for those objections are, more properly, the subject matter of an appeal, and the defendant has not chosen to resort to that remedy.

The rule discharged [1] [† 113].

[†] *Vide infra*, 791. Note (2).

[1] There were two other rules of the same sort, which had been obtained by two other brewers, of the names of *Hall* and *Green*, at the same time with this, and were discharged at the same time, without argument.

[† 113] The following case was determined, *H* 23 Geo. 3.

The KING vs. FRANCES ABBOT.

This was a conviction, by two justices, upon the statute of 11 Geo. 1. c. 30. § 16. for harbouring tea and spirits.

In the beginning of the term, *Peckham*, on the affidavit of the defendant and another person, obtained a rule for the two justices, to shew cause, why a writ of *certiorari* should not issue, directed to them, to remove into this court, all records of conviction before them had, on the 17th of

June last, against the defendant, for the forfeiture of eight bags of bohea tea, two bags of congo tea, twenty casks of geneva, and one cask of rum, and treble the value thereof, by her incurred, for or by reason of her harbouring, keeping, or concealing the same.

On *Wednesday*, the 5th of February, *Wallace* shewed cause, and contended 1. That, as the affidavit on which the rule was obtained went only on the merits, denying the truth of the charge, the court, if they had the power of granting a *certiorari*, would not do it, as inquiry into the merits, being properly the subject matter of an appeal, and not competent to this court. For this he relied on the case of *Rex v. Whitbread*. But,—2. He argued, that *certiorari* would lie in this case. The offence was created by 11 Geo. c. 30. § 16, and by § 39. of the same

1786.

The King
against
WHIT-
BREAD.

[554]

statute, it is enacted, " That all fines, penalties, and forfeitures, by this act before imposed, of and concerning the suing for, recovering, and dividing, whereof, other directions are not herein given, shall be sued for, levied, or mitigated, by such ways, means, and methods as any fine, penalty, or forfeiture, is, or may be, sued for, recovered, levied, or mitigated, by any law, or laws, relating to his Majesty's revenues of excise, or any of them; or by action, &c." Those general words have the same operation as if the specific clauses relative to matters of jurisdiction contained in the former excise laws had been re-enacted *verbatim* in this, and were adopted merely to avoid unnecessary repetition. *N. v.* by the statute of 10 Geo. 1. c. 10. it is expressly enacted, (§ 42.) " That the judgment, which shall be given in pursuance of that act by the commissioners of excise, and justices of the peace, respectively, shall be final, and not liable to be removed by *certiorari*, into any of the courts at *Westminster*." By § 21. of the act of 6 Geo. 1. c. 21. the *certiorari* is expressly taken away as to the forfeitures created by that section; and by § 22. generally, " As to every other forfeiture which shall or may, be made, by virtue, or in pursuance, of any act, or acts, whatsoever, relating to the duties of excise, or any other duties under the management of the commissioners of excise." Accordingly, in *Rex v. Whitbread*, the court held, that, in consequence of that last mentioned section, no *certiorari* lay to remove a conviction under the statute of 12 Car. 2. § 33.

Peckham, in support of the rule insisted, — 1. That, on the merits, as sworn to in the affidavit, the conviction could not be supported. The offence, created by the statute, is knowingly to harbour, &c. and, upon the construction of the word " knowingly," the court of *Exchequer* have established these distinctions, viz.

1. That, where the goods are found

in the house of the party, the knowledge shall be presumed; 2. That, if they are found in his grounds, some direct evidence of his knowledge must be given; and, 3. That, if they are found in an out-house belonging to him, the presumption shall not arise, unless it is shown that he himself kept the key. It may be true, that this court cannot decide upon the merits; but, by removing the conviction, they will see the evidence (a); and can decide, whether the justices have followed any of those rules of construction. The defendant swears, that she is a cripple, and unable to stir without crutches; that the tea was found in a barn 120 yards from her house, and the brandy at the distance of a quarter of a mile, in a ditch adjoining to her land; that there was no evidence of her knowledge before the justices; that in fact she knows nothing of the goods, and had no interest in them. If all this is true, she ought not to have been convicted. — 2. There is no statute which has taken away the *certiorari*, in a case like the present. The act of 11 Geo. 3. c. 30. § 16. has no words of reference to those of 10 Geo. 1. c. 10. or of 6 Geo. 1. c. 21. The defendant does not object to the forfeiture of the tea and spirits; as to that point, she is willing to admit that the condemnation is conclusive, but not as to the treble value. The argument on the other side seems to be, that the general clause in 6 Geo. 1. c. 21. takes away the *certiorari* in all cases. But it has been determined, by the court of *Exchequer*, in the case of *Warwick v. White* (b), that the words of that statute are to be strictly, and literally, construed, and several subsequent statutes have, in express terms, taken away the *certiorari* in particular cases, which would have been unnecessary if it had been already taken away in all cases by 6 Geo. 1. c. 21. Thus, by 8 Geo. 1. c. 18. § 16. it is taken away in the particular instances

(a) *Kide v. Read*, *supra*, p. 486.(b) *Stacc. B.* 1722. *Bunb.* 106.

1780.

The KING
against
WHIT-
BREAD.

stances there mentioned. Can it be supposed that such a provision would have passed two years only after 6 Geo. 1. if the same thing had been already done by the act of that year? A similar express provision has been mentioned on the other side in 10 Geo. 1. c. 10; and there is one of the same sort in 23 Geo. 2. c. 21. § 33. What is still more remarkable, in an act which passed so lately as 21 Geo. 3. called the *Cocoa* act, a general clause was introduced, which enacted as follows: "All judgments of the commissioners of excise, or justices of the peace, within their respective jurisdictions, for the condemnation of any commodities, goods or effects, seized, as forfeited, under this, or any other act, or acts of parliament, relating to the duties of excise, or other duties under the management of the commissioners of excise, shall be, and shall be deemed and taken to be, as final and conclusive, to all intents and purposes whatsoever, as any judgment for the condemnation of any commodities, goods, or effects, given in his Majesty's court of *Exchequer* (c):" This clause was objected to in the House of Commons, and agreed to be expunged; but, having somehow or other remained in the bill, and received the royal assent, another act was brought in, and passed, that very session, for the purpose of repealing it (d). The clause, and the repeal, would have been equally nugatory, if the effect of 6 Geo. 1. c. 21. § 22. had been as general as is contended. There have, in fact, been many cases; where *certiorari*s have issued to remove convictions under the excise laws, and, as to the late determination in *Rex v. Whitbread*, it does not apply here, be-

cause that was a conviction by the commissioners of excise. Very soon after the act of 6 Geo. 1. c. 21. the case of *Rex v. Theed* happened, which is reported by *Strange*, and also by Lord *Raymond* (e), who must have known the intention of that statute, having been *Solicitor General* when it passed, and a judge when the case was decided. To that case may be added those of *Rex v. The Justices of Southampton* (f), which is reported by *Barnardiston*, and the rule for the *certiorari* entered in the rule-book of the crown-office, p. 242, and afterwards made absolute; a second case of *Rex v. Theed* (g); *Rex* (on the prosecution of *Redburn*) v. *Miller & Reeve Justices of Berkshire* (h); *Hule v Evelyn & Nash* (i); *Alexander v. The Justices of Berkshire* (k); *Rex v. The Justices of Essex* (l); and *Rex v. The Justices of Suffolk* (m).

Wallace, in reply, — [555]

The commissioners and justices of peace are put exactly on the same footing, by the different statutes on which I rely, within the limits of their respective jurisdictions, and, therefore, although the case of *Rex v. Whitbread* arose on a conviction by the commissioners, it is a solemn decision in point upon the present question. Several of the cases now cited for the defendant were mentioned in that case, particularly *Rex v. Theed*, to which the answer was, that the objection was not taken. The new cases now mentioned all passed *sub silentio*. There is no hardship in taking away the *certiorari*, for there is a remedy on the merits, by an appeal from a conviction by justices, to the quarter-sessions; and, unless in matters of law, or form, a defendant would have no redress if a *certiorari* were allowed. It is not yet settled whether a conviction before justices or the commissioners

(c) 21 Geo. 3. c. 55. § 47.

(d) 21 Geo. 3. c. 64.

(e) *M.* 11 Geo. 1. 1 *Str.* 608. 2 *Ld.*

R. ym. 1375.

(f) *M.* 3 Geo. 2. 1 *Barnardist.* 245.

(g) *T. & M.* 5 Geo. 2. 2 *Barnardist.*

16. 73. 1 *Seff. Ca.* 2d edit. 417.

(h) *M. & E.* 17 Geo. 3.

(i) *M.* 18 Geo. 3.

(k) *M.* 19 Geo. 3.

(l) 1779. *Qu.* the term?

(m) *Qu.* the year and term?

missioners, would be a conclusive defence against an action brought by the party convicted. A bill of exceptions is now depending, which has been settled by agreement, in order to bring that question before this court (a). The clause in the *Cocoa* act was left in by mistake, and the officers of the crown, of themselves, brought in the act to repeal it. It was agreed to be omitted that the point might first be determined.

The court took time to consider; and, on *Wednesday*, the 12th of *February*, Lord MANSFIELD delivered their opinion, to the following effect:

Lord MANSFIELD, — This case has been argued, on the part of the prosecutor, on two grounds; *viz.* 1. That by law, a *certiorari* is not grantable; 2. That, if there were a power in the court, in their discretion, to grant it, they ought not to do it upon the present occasion; because the objection is upon the merits, and not to the jurisdiction. 1. The case of *Rex v. Whitbread* has been cited, as in point. On the other side, it is said, that it does not apply, because the conviction there was by the commissioners. But we are all clearly of opinion, that there is no distinction in that respect. The jurisdictions, by all the acts relative to the excise, are distinct in their limits; that of the commissioners is within the bills of mortality; that of justices, in all other places; but in every other point of view, their powers are the same; and, wherever the statutes take away the *certiorari* in the case of convictions before the commissioners, they also do so as to convictions before justices. However, notwithstanding this, we think *Rex v. Whitbread* is not an authority to govern this case. That was a conviction on a statute long prior to 6 Geo. 1. *viz.* 12 Car. 2. c. 24. Sup-

posing it, therefore, clear, that the act of 6 Geo. 1. takes away the *certiorari* in the case of all forfeitures and penalties created before that time, it

does not necessarily follow, that it is taken away in cases of forfeitures and penalties introduced since. The counsel for the prosecutor relied on § 39, of 11 Geo. 1. c. 30. and contended that the general words of that clause re-enact those of 10 Geo. 1. c. 10. § 42. as much as if they had been expressly repeated. This is certainly true, as to the form and mode of prosecution and conviction, but it is not a consequence, that it is equally true, as to what shall, or may, be done after conviction. If this is not clear, and we think it is not, then the old general rule applies, *viz.* that nothing but express negative words shall take away the jurisdiction of this court. This opinion is fortified by the words of 10 Geo. 1. c. 10. § 42. and by the second case of *Rex v. Theed* [† 114], by *Rex* (on the prosecution of *Redburn*) v. *Miller*, and the other cases which have been cited; for, though the objection does not appear to have been taken in those cases, that very circumstance shews the general sense of *Westminster Hall*, and we are, therefore, all of opinion, that the *certiorari* is not taken away in the present case. 2. But, the motion has been made, not on an objection to the jurisdiction, but on the merits; and, in *Rex v. Whitbread*, the court thought, that would have been a sufficient reason for not granting a *certiorari*, if it had been otherwise competent. We all adhere to that opinion.

The rule discharged.

(a) I believe it never was argued. [† 114] That was a conviction on a clause in this very act of 11 Geo. 1.

c. 30. § 27. The former case of *Rex v. Theed*, was on 8 Ann. c. 9. § 10.

1780.

The KING
against
WHIT-
BREAD.

The End of MICHAELMAS Term, 21 GEORGE III.

C A S E S
ARGUED and DETERMINED
IN THE
Court of KING's BENCH,
IN
Hilary Term,

In the Twenty-first Year of the Reign of GEORGE III.

1781.

Tuesday,
23d January.

PEARSON *against* ILES.

The further
recompence gi-
ven by 5 *El. c.*
9. § 12. against
a witness for
non-attend-
ance, must be
assessed by the
court out of
which the pro-
cess issued, not
by the jury, or
judge, at *visi*
prisi.

ACTION of debt on the statute of 5 *El. c. 9. § 12*,
the words of which are :

“ That, if any person, or persons, upon whom any process out of any of the courts of record, within this realm, or *Wales*, shall be served to testify, or depose, concerning any cause, or matter, depending in any of the same courts, and, having tendered unto him, or them, according to his, or their countenance, or calling, such reasonable sums of money, for his, or their costs and charges, as, having regard to the distance of the places, is necessary to be allowed in that behalf, do not appear, according to the tenor of the said process, *having not a lawful and reasonable let, or impediment*, to the contrary, that then the party making *default, to lose and forfeit*, for every such offence, 10*l.* and to yield such further recompence to the party grieved, as, by the discretion of the Judge of the court out of which the said process shall be awarded, according to the loss and hindrance that the party which procured the said process shall sustain, by reason of the non-appearance of the said witness, or witnesses ; the said several sums to be recovered by the party so grieved, against the offender, or offenders, by action of debt, bill, plaint &c.”

[557]

The plaintiff had *subpœna'd* the defendant to attend, as a witness, on the trial of an ejectment, in which he was

klfor

lessor, and had paid him a guinea for his attendance, but, when the cause was called on, the defendant was absent, and the plaintiff was non-suited; upon which he brought the present action.

The first count in the declaration stated the proceedings in the ejectment, the *subpœna*, and that the trial came on, but that the defendant, not regarding the statute in such case made and provided, nor fearing the penalty therein contained, although then, and there, solemnly called for, did not appear to give his testimony, although he had no lawful, or reasonable, let or impediment to the contrary, but refused and neglected so to do, in contempt of the statute, and that, by reason of his neglect in that respect, and, because the evidence he would have given, for the said *Richard Fenn*, (the plaintiff in the ejectment,) would have been material, and was necessary for the said *Richard* to prove and maintain his said recited declaration and the matter therein contained, the said *Richard*, for want of the testimony of the defendant, could not safely receive, and abide, the verdict of the jury, but, they having departed from the bar, and conferred, and agreed, among themselves, and then returned to the bar, the said *Richard*, being solemnly called; did not come, nor did further prosecute his said writ; that judgment of non-suit was afterwards entered up against the said *Richard*, and 4*5*l. awarded against him, for costs and charges; that the ejectment was commenced and prosecuted, at the expence, and for the benefit of the present plaintiff; and that he had paid the 4*5*l. to the defendant in the ejectment, to avoid the execution on the judgment; that he had, besides, laid out, and expended, in and about the prosecution of the said recited suit, a large sum, to wit, 3*5*l. and had also sustained damage, over and above those several sums, by reason of the defendant's not appearing to the value of 100*l.* and that, by reason of the said premises, and by force of the statute, an action had accrued to the plaintiff, *being the party grieved in this behalf*, to demand and have of the defendant, the sum of 190*l.* to wit, the sum of 10*l.* and his said damages.

There was another count, stating the proceedings in the ejectment more briefly, but to the same effect with the first, except that it alledged, that, besides paying the guinea to the defendant on serving the *subpœna*, the plaintiff had also promised to pay him such further reasonable sum of money, as his reasonable costs and charges should amount to, over and above the said guinea [1].

The

[1] According to the declaration in *Godwin v. West*, cited *infra*, p. 559. *Nota*: (b).—But the declaration, in that case, was held to be ill, because the

statute gives the action to the party grieved, and no loss or damage was specifically alledged.

1781.

PEARSON
against
LEES.

[558]

1781.

PEARSON
against
ILES.

The verdict was, "That, as to the said sum of 10*l.* in the last count of the said declaration mentioned, and as to the sum of 10*l.* parcel of the 180*l.* the damages in the said last count mentioned, the defendant owes the same several sums of 10*l.* and 10*l.* in manner and form, &c." and an acquittal as to the rest.

In *Easter Term*, 20 *Geo.* 3. a rule was obtained to shew cause, "why the plaintiff should not have judgment for 80*l.* (*viz.* his own costs, and the defendant's in the ejectment,) besides the penalty of 10*l.* and also for the costs of this action [2], to be taxed by the Master, for a further recompence to him, as the party grieved, in pursuance of the statute of 5 *Eliz.*"

This rule stood over among the peremptories, to *Trinity Term*, 20 *Geo.* 3. when the cause was argued, on *Wednesday*, the 31st of *May*, by *Davy*, Serjeant, and *Morris*, against the rule, and by *Dunning*, and *Chambre*, for the plaintiff.

Against the rule, it was said, that, in all the old records and precedents, the declaration is only for the penalty. This was the first attempt to include the further recompence for damages, in the debt laid in the declaration. If the court should think themselves authorised to go upon this motion, into the consideration of the damages, they would also inquire into the merits of the verdict, and not hold the defendant concluded, even as to the penalty, by the verdict. Should the court enter into that consideration, and permit *affidavits*, then ready to be filed, it would appear, that there was a lawful and reasonable cause for the defendant's absence, and that the plaintiff had not suffered thereby; for that, having brought another ejectment, he was again nonsuited, for want of title.—(HEATH, Serjeant, who tried the cause, had ruled, that the question, whether there was a lawful and reasonable impediment, was matter of law, to be decided by the court, and not by the jury.)—It is, it was said, very difficult to put a clear construction upon the statute; some material words, as "*shall be assessed*," "*adjudged*," &c. seeming to be omitted in the common printed copy, which differs from the original edition, but corresponds with the record at the *Rolls*.—(*Morris* said, he had compared them)—They cited *Hawithbury v. Harvey* (a), *Goodwin v. West* (b), *Maddison v. Shore* (c), and *Aston's Entries* 90 [3].

[559]

[2] It was decided in the case of *Maddison v. Shore*, cited *infra*, p. 559. Note (c), that the plaintiff is entitled to costs in this action.

(a) *B. R. E.* 31 *El. Cro. El.* 130.

(b) *B. R. M.* 14 *Car. 1. Cro. Car.* 522. 540. *S. C.* Sir *W. Jones*, 450. *March* 18.

(c) *B. R. T.* 9 *Will.* 3. 5 *Mod.* 355. *S. C. Comb.* 449. called *Shore v. Maddison*, and 1 *Salk.* 206. called *Shore v. Maddison*.

[3] In that precedent the clause of the statute is recited.

On the other side, it was insisted, that, though the statute is inaccurately penned, the meaning is plain. That the true construction is, that the damages should be ascertained by the court. The word "*recovered*" applies it was said, to the judgment, not to the verdict, and therefore, there could be no judgment, even for the 10*l.* damages, until there should be an assessment by the court. The *quantum* of the damages could not be any matter of dispute, the two sums of 45*l.* and 35*l.* being the amount of the bills of the two attornies, in the original cause; both of which were paid by the plaintiff; and, as to the propriety of the verdict for the penalty, *that* could not be gone into upon *affidavits*, it being the province of the jury alone, to say, whether the circumstances were such as entitled the plaintiff to maintain the action.

BULLER, *Justice*, observed, that, by the statute, the damages, as well as the penalty, were made a *debt*, to be recovered by an action of debt, and accordingly were so declared for, and therefore asked, how the plaintiff had taken a verdict for any thing in the name of *damages*. He also took notice that the debt declared upon was 190*l.*

To this last observation it was answered, on the part of the plaintiff, that this was not an action of debt of that sort in which it is necessary to recover the precise sum laid; and, as to the 10*l.* given by the jury, in the name of damages, *that*, it was said, might be remitted, and judgment only entered for the penalty, and such damages as the court should now assess.

BULLER, *Justice*, then hinted, but said he did not mean to give an opinion, that the proper method of proceeding might be, for the court to be applied to, in the first instance, to assess the damages, by ascertaining the costs in the original cause, and then to bring debt for that sum and the penalty added together.

To this Dunning answered, that there might be damages, exclusive of the costs on both sides, and, besides, the court could not, with propriety, make an assessment by anticipation, when it might turn out, on the trial, that the plaintiff had no cause of action.

Lord MANSFIELD said, that, as there was no instance of a similar proceeding, since the statute, it would be proper for the court to take time to consider of their determination. His Lordship expressed some doubt, whether the payment, or tender, to the witness, for costs and charges, was properly laid.

Dunning said, that by the acceptance of the guinea, and the promise to pay such farther reasonable sum, &c. (as laid in the second count,) it had become unnecessary to make any farther tender [4].

1781.

PEARSON
against
ISLES.

[560]

The

[The seems to have been determined in *Goslin v. West*, *supra*, p. 459. Note (b).]

1781.

PEARSON.
against
JES.

The case stood over, and the defendant had leave to file *affidavits*, tending to diminish the *quantum* of the damages, but not such as might impeach the verdict, because *that* could only have been done on a motion for a new trial.

This day, Lord MANSFIELD, after stating the case, delivered the opinion of the court to the following effect:

Lord MANSFIELD,—It is admitted, that the plaintiff was 80*l.* out of pocket, by reason of the nonsuit; but the question is, When, how, and by whom, the damages are to be assessed; whether before or after the trial; by the judge at *nisi prius*, the jury, or the court? In this case the jury took upon themselves to do it; and have given under the sum expended. Precedents were cited of actions of debt for the penalty, but there are none for the damages. We, therefore, took time to consider.—1. At the trial, it was proved, that the witness did not purpose and maliciously absent himself on the trial of the ejectment; that he did attend, and meant to give evidence, but, having consulted the plaintiff's attorney, about the time when the cause was likely to come on, *he* told him he would have time to go to see the camp; that, when the cause was tried, it was never mentioned to the judge that a witness of the plaintiff's was absent, nor alleged that there was any material evidence which the plaintiff had not been able to produce; no new trial was moved for, and there has been another nonsuit in a new action. There is, therefore, the strongest reason to think, that the defendant could not have given any material evidence, and I should have thought the conversation with the plaintiff's attorney, and the sort of leave given by him, *reasonable let*, within the meaning of the statute. However, *that* was proper for the jury to decide, and there has been no motion for a new trial.—2. With regard to the construction of the statute; the courts of *Westminster Hall* most clearly now, (and they also did so before the statute,) proceed against witnesses who wilfully absent themselves, as for a contempt; and remit the punishment if they redeem their offence by making satisfaction to the party. The legislature, by this statute, meant to give further recompence of 10*l.* in addition to what the court might assess as a satisfaction in damages. But it is not the jury, nor the judge who tries the cause, but the court out of which the process issues, by whom the assessment is to be made [5]. Upon such an adjudication

[5] In the statute of 3 Hen. 7. c. 10. giving costs and damages to an original plaintiff, in whose favour judgment has been affirmed, upon a writ of error,—“Justice” in the singular number, is, without the possibility of a doubt, made use of, instead of “Court;” for the words are, “the discretion of the Justice” and “whom the said writ of error is sued” and there is no court of error consisting of only one judge.

or assessment, there is no doubt but debt might be brought. But it never has been done. Why? Because there is a preferable remedy, by attachment. The jury, here, have done what the court ought to do. An action will lie for damages, against a material witness who absents himself without any excuse. But that must be an action *on the case*. In an action of *debt*, also, the jury may give damages for the detention of the debt. But the damages here given, are for the injury stated in the declaration. Perhaps, the real justice of the case would be to give leave, now, to move for a new trial, upon which, if granted, the defendant would have an opportunity of laying the cause of his absence before another jury. But *that* would be expensive, and we are, therefore, inclined to let the plaintiff take judgment for the penalty, and one shilling damages for the detention of the debt, if he will release the *10l.* for damages, there being the strongest suspicion that no injury was done. If these terms are not acceded to, we will give leave to move for a new trial.

The counsel for the plaintiff agreed to the terms proposed by his Lordship, and undertook further, by the desire of the court, not to bring an action on the case for damages.

1781.

PEARSON
against
ISLAS.

[562]

The KING *against* the INHABITANTS of
SANDWICH, otherwise SWANNAGE.

Saturday,
27th January,

CERTAIN occupiers of lands, in the parish of *Sandwich*, or *Swannage*, in the Isle of *Purbeck*, in *Dorsetshire*, had appealed to the Quarter Sessions for that county, against a poor-rate; setting forth, in their notice of appeal, among other objections, "That the rate was unequal, and partial, because tenements and farms, consisting of houses, lands, or grounds, were, in such rate, or assessment, charged and assessed at one penny in the pound, and cottages, or dwelling-houses, at only three farthings in the pound, whereas such cottages, or dwelling-houses, ought to have been rated and assessed, on a par with tenements and lands, at one penny in the pound." Upon hearing this appeal, the justices quashed the whole rate, and ordered a new equal assessment to be made, stating the following case for the opinion of this court:

That it was proved, on hearing the appeal, that the rate was an assessment of one penny in the pound on the occupiers of lands, and three farthings in the pound on the occupiers of cottages and dwelling-houses, according to their

Whether
houses are to be
rated to the
poor in a dif-
ferent propor-
tion from lands,
must depend
on local cir-
cumstances,
and the court
will not quash
an order for
rating them
equally.

1781.

The KING
against
SWANNAGE.

their then annual rents; that, from the year 1775 to the year 1776, a constant distinction had been observed, in rating houses and lands, the former having always been rated in less proportion to their rents, at the respective times of such rating, than the latter; that the land in general, in the parish of *Swannage*, is burthened with no particular charges that are not incident to land in general; but that both lands and houses are subject to the usual repairs, and taxes, generally incident to each respectively.

The proceedings having been removed by *certiorari*, the case was now argued, by *Rooke*, against the order of Sessions, and *Dunning*, in support of it.

The court having desired *Rooke* to begin, he stated, that, on a late occasion, in a case from this parish, the court had hinted, that a distinction ought to be made between lands and houses, in consequence of which, as well as in compliance with the usage from 1735 to 1776, this rate had been made. It is, he said, the general practice throughout the kingdom, to rate houses lower than lands, because they require continual repair. He also objected, that the notice was too general, for that it ought to have specified, *nominatim*, the particular houses and cottages, that were *under-rated*, and the lands that were *over-rated*. And he contended, that, at all events, it was not necessary to have quashed the whole rate; that the assessment on the lands ought to have remained, and the rate to have been amended, by increasing the sum assessed on the houses. On this last head, he cited *Rex v. Witney (a)*, and *Rex v. Ringwood (b)*.

Dunning, on the other side, insisted, that the court never had, and never will, lay down a general rule that houses should be rated lower than land. The proportion between them must depend on local circumstances; and there were, he said, local circumstances in this parish, which made it reasonable that they should be equally rated. One which he suggested was, that nine-tenths of the burthen of the poor arise from the houses. The rate, he contended, could not have been amended, for the objection affected the whole. A rate is a distribution of a given sum, over a certain number of persons, and, if the quota charged on one or more persons is too high or too low, the proportion assessed on all the rest ought to be altered [15].

Lord MANSFIELD.—I. There can be no general rule as to the proportion between lands and houses [† 115]. It must

(a) *E. 10 Geo. 3. Bott. 34.* Since reported, 5 *Burr.* 2634.

(b) *T. 15 Geo. 3.* Mentioned in a note in 4 *Burr.* 1295.

[15] This has been since expressly determined, *Rex v. Maddern*, *H. 27*

Geo. 3. 1 Term' Rep. 625. Yet *see Rex v. Chesnut*, *T. 28 Geo. 3. 2 Term' Rep. 623.*

[† 115] *Vide Rex v. Brograve*, *M. 10 Geo. 3. 4 Burr. 2491. 2493.* *Rex v. Lakenham*, *E. 25 Geo. 3.*

must depend on particular local circumstances. There are no circumstances stated in this case, to shew that houses ought to be rated lower; and, if what is suggested is true, that is a strong circumstance the other way.—
2. The objection unavoidably goes to the whole rate, for it is made, throughout, by a rule and proportion which the justices thought wrong; and, therefore, they could do nothing but quash the whole.

1781.

The KING
against
SWANNAGE.

The order of sessions confirmed.

[564]

The KING against the INHABITANTS of Saturday,
HECKMONDWICKE. 27th January.

ORDER of removal of *Frances* the wife of *Abraham Preston*, a soldier, and *Joseph* their child from the township of *Batley*, in the West Riding of *Yorkshire*, to *Heckmondwicke*, in the same Riding; confirmed by the court of Quarter Sessions, who state the following case:

"That ——— *Preston*, widow, the mother of the said *Abraham Preston*, the husband of the pauper, occupied a dwelling-house in the township of *Batley*, and was rated and paid all assessments till the time of her death, which happened on the 15th of *March* 1778; that, upon her death, the said *Abraham Preston* became tenant of the said house, from that time until the year 1780, and, during all that time, paid all the assessments charged on the said house; that it was known to the parish-officers of *Batley* that the said widow *Preston* was dead, and that the said *Abraham* was tenant and occupier of the said house, and that the assessments being produced, it appeared that the name of widow *Preston* was continued therein."

Cockhill argued in support of the order of removal, and cited *Rex v. Sarratt* (a), *Rex v. Bramshaw* (b), *Rex v. Carbalton* (c), and *Kinsare v. Kingwinford* (d), which last he insisted on as a case exactly in point with the present.

Fearnly was to have argued on the other side, but was stopped by the court.

Lord MANSFIELD, — There must be such a rating and paying as to shew manifestly that the parish had notice. Here the rate was continued in the name of a dead person whom the parish-officers knew to be dead; the pauper's husband was the occupier, and the charge was made upon

If the name of a former occupier who to the knowledge of the parish-officers is dead is continued in the poor-rate, but the present occupier pays, he shall gain a settlement.

(a) M. 9 Geo. 2. Burr. Settl. Ca. No. 21 S. C. 2 Str. 1023.

(c) E. 15 Geo. 3. Burr. Settl. Ca. No. 252.

(b) M. 10 Geo. 2. Burr. Settl. Ca. No. 29.

(d) E. 4. Geo. 2. Fol. 137. Bott. 329. S. C. mentioned in Burr. Settl. Ca. No. 29. p. 99.

1781.

upon him, and could be on nobody else.—This has been determined very lately in a case where the article in the rate was “*Late Lowbridge’s*” [1].

Both the orders quashed [† 116].

[1] *Rex v. Walsal*, M. 18 Geo. 3. *Mitcham*, E. 23 Geo. 3. *supra*, p. 226.

[† 116] *Vide Rex v. St. John’s*, T. Note [† 65].

19 Geo. 3. *supra* p. 225. and *Rex v.*

[565] GOODTITLE, Lessee of CLARGES and Earl
FERRERS, against FUNUCAN.

Saturday,
27th January.

THE material facts of this case were these:

Where there is a power to grant leases in possession, but not by way of reversion or future interest, a lease *f. verba de presenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee.—

Under a power to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same, such parts of the estate enumerated in the power as have never been demised may be let.—
Qy. If a lease made under such a power, reserving the old rent, but with covenants less advantageous to the reversion than formerly, would not be a fraud on the power, as void.

Washington, the last Earl *Ferrers*, was tenant for life, under a settlement made in 1741, in which there was the following power:

“That it shall be lawful for the tenants for life, respectively, from time to time, and all times during their respective natural lives, and when they shall respectively come into, and be in, the actual possession of the aforesaid manors and premises, by virtue of the limitations aforesaid, by indentures under their hands and seals, to demise all or any of the said manors, messuages, lands, tenements, and hereditaments, herein before mentioned, or any part thereof, to any person or persons whomsoever, in possession, but not by way of reversion or future interest, for the term of twenty-one years absolute, or any lesser absolute term; or for any term or number of years determinable upon one, two, or three lives, so as, upon every such lease or leases respectively, there be reserved and made payable, during the continuance of such lease or leases, respectively, to be incident to, and go along with, the immediate reversion or remainder of the premises so leased, so much, or as great yearly rents as, or more than now is, and are paid, and yielded or agreed to be paid and yielded, for the same, or proportionably for any part thereof.”

All the lands comprised in the settlement that lay in the parish of *Sutton St. Anne’s*, (except about thirteen or fourteen acres, and two or three cottages,) were part of a large common field. In 1774, an act of parliament (a) passed for inclosing this common, and an allotment was made to Earl *Washington*, in lieu of his interest in the common. On the 15th of March 1775, before the inclosure took place, his agent, by his lordship’s authority, let the new allotted lands, by agreement in writing, to three persons, *Palmer Bramley*, and *Jelley*, at the value set upon them by the commissioners under the act of parliament, to occupy till the 10th of March 1776. On the 17th of August 1779, Earl

(a) *Priv. Acts*, 14 Geo. 3. c. 27.

1781.

GOODTITLE
against
FUNUCAN.

Earl Washington by indenture, reciting the power, demised to the defendant *Editha Maria Funucan*, for 99 years from *Lady-day* then last past, if she should so long live, at the yearly rent of 134*l.* (which was recited to be more than was paid for the demised premises at the time of the settlement,) all the manors and fishery, with the rights, &c. and the messuage, lands, &c. in *Sutton St. Anne's*, then in the occupation of *Palmer, Bramley, and Jelley*, as under-tenants of the said *Editha*, or in whose possession soever the same then were, or had been. The defendant covenanted to pay half the land-tax, (amounting to about 7*l.* 10*s.*) and the Earl covenanted, for himself, his heirs, executors, administrators, and assigns, to free the defendant from tithes, and from levies and payments for the church. The rights to shoot and fish were reserved to the lessor and those in remainder. By the enclosure act, the lands were discharged from tithes, and an allotment in lieu thereof made to the defendant. The manors, or manerial rights, had never been let before. The fishery had been let before, but was not at the time of the settlement. Since that time, it had been again let at 15*s.* The 134*l.* payable by the defendant was about 30*l.* more than the demised premises had ever produced before. That part not comprehended in the agreement above-mentioned with *Palmer, Bramley, and Jelley*, was, at the time of the lease, in the occupation of tenants at will. At the time of making the lease, the Earl directed the occupiers to pay their rent to the defendant, and they accordingly did pay her all the rent which accrued afterwards.

After the death of *Earl Washington*, an ejectment was brought against *Mrs. Funucan*, to recover the demised premises, and a verdict found for the plaintiff. But a new trial having been granted, the cause came on, before *Eyre, Baron*, at the last *Lent assizes* for the county of *Nottingham*, who left it to the jury, whether the attornment of the occupiers to the defendant, in consequence of the directions given them at the time of making the indenture, did not amount to a surrender by them, and whether they were to be considered as having become, thereby, parties to the lease, and has having put the defendant in possession; and the jury were of opinion with the defendant, and found a general verdict for her.

In *Easter Term*, 20 *Geo.* 3. a rule for a new trial was again granted, and, in that term, the case was argued, by several counsel of a side. It was then insisted, that some of the premises for which the action was brought were situated in the parish of *Sutton St Michael's*, and this appearing to be the case, the plaintiff had judgment as to them, the title of the defendant only extending to *Sutton St Anne's*. As to the rest, the court directed that the case should stand

[567]

1781.

GOODTITLE
against
FUNUCAN.

stand over, to be argued again, by one counsel of a side and that *affidavits* should be produced, to clear up some facts, not fully stated in the judge's report.

In last *Michaelmas Term*, on *Friday*, the 17th of *November*, *Hill*, Serjeant, argued for the plaintiff, and the *Attorney General* for the defendant.

For the plaintiff, three points were made. 1. That the lease to Mrs. *Funucan* was a lease in reversion, and, therefore, contrary to the power, and void. 2. That the manors and fishery were not demiseable under the power. 3. That the covenants in the lease were not so beneficial to the remainder-man, as those in the ancient leases. 1. It was contended, that *Earl Washington*, at the time of the demise to the defendant, could not grant an immediate lease in possession, because part of the premises were then let, under an express agreement, for a term, of which several months were still to run, and though the rest was stated to have been in the hands of tenants at will, yet, as the law now stands, they must be considered as tenants from year to year, and entitled to six months notice. Lord *Ferrers* could not have brought an ejectment against any of them, at the time of the demise, and therefore had no immediate possessory right; such right, and the right to recover in ejectment, being convertible. The clause of powers, confining tenants for life to grant leases only in possession and not in reversion, was borrowed from the statutes relative to ecclesiastical leases. In *Hunt v. Singleton (a)*, a lease for forty years, by the Dean and Chapter of *St. Paul's*, of a house in *London*, though made to commence immediately, was held to be void, under 14 *El. c. 1* § 19. because, at the time of making it, the house was already in lease, to a stranger, for 10 years, the words of the statute being "that no lease shall be permitted to be made; by force of this act, in reversion," &c. the authority of that case, though questioned in 1 *Mod.* 205. on another point, is allowed in 10 *Co.* 59. a. and confirmed by the *Dean and Chapter of Westminster's Case*, in *Carter (b)*. In like manner, in a case upon a power, viz. *The Duke of Buckingham v. Lord Antrim (c)*, the words of the power being, "to make leases for 21 years in possession," leases though made to commence *in presenti*, yet, being of lands then under lease, were held to be void, by the Lord Chancellor, assisted by the Chief Justice of the Common Pleas, and the Chief Baron. It makes no difference, as to this question, that the subsisting leases were not by deed, since a parole lease for three years, or less, is equally effectual with a lease by indenture; and the court cannot draw the line, and say, that a lease granted under a power, like the

(a) C. B. E. 39 *El. Cro. El.* 564.

(b) C. B. M. 16 *Car.* 2 *Carter* 9.

(c) In *Canc. H.* 14 & 15 *Car.* 2.

1 *Sid.* 101. 1 *Godb.* 327.

1781.

GOODTITLE
against
FURUCAN.

present, shall be good, although there is a subsisting term for seven months, at the time of granting, but shall be void, if there is a subsisting term for seven years. The legislature only, or the parties, can draw such a line. In the *Dean & Chapter of Westminster's case*, it is the doctrine of Sir Orlando Bridgman, the father of conveyances, and who, probably, invented these very powers, that "all leases, where there is a particular estate out, are leases in reversion (b)". The interposition of the legislature, in *Geo. 2. c. 28. § 6.* to enable landlords to renew leases, for lives, on the surrender of the former leases, although the under tenants should not likewise surrender, corroborates this doctrine.—2. With regard to the manors and fishery, the power cannot be extended to them; the manors had never been let; the fishery was not, at the time of the settlement; and the power requires the rent then paid, or more to be reserved. Things, for which no rent was then paid, could not be meant to be comprehended. This will avoid the whole lease: for one entire rent is reserved, and it cannot be apportioned. Thus, in *Mountjoy's Case (c)*, there being a settlement, under an act of parliament, by which it was declared, that the tenants for life should not alien, bargain, give or sell, any of the said castles, manors, &c. nor any part thereof, but only for, &c. "yielding the true and ancient rent of the said lands and tenements, so by them letten as aforesaid, &c." and the moiety of a manor comprised, with other things, in the settlement, having been demised at an entire rent, and a special verdict having found that the manerial rights had never before been demised, the court determined, that the lease was totally void, holding that nothing could be demised under the restraining clause in the act, unless what had been let, and had yielded rent, before; and though some part of what was then demised had been let before, yet the rent could not be severed and apportioned. To the same effect are the cases of *Tristram v. Lady Baltinglass (d)*; and *Bagot v. Oughton (e)*. In that last case, there was a certificate of the Judges of the King's Bench, to whom it had been referred by the Chancellor, as appears by the Register's books; but the certificate had been lost, and no decree can be found, although it is said, in *8. Mod. (f)* that there was one, and that it was affirmed, on an appeal to the house of Lords [1]. There is another case of the same name, and between the same parties, in *1 P. Will. (g)*, but it is upon another point.

[569]

(b) Carter 14.

(c) *M. 26 & 27 El. Moore* 197. *S. C.**Co. 3.*(d) *C. B. H. 19 & 20 Car. 2.**ough. 28. S. C. Sir Th. Jones, 27.*(e) *B. R. M. 12 Geo. 1. Fort.**31. 8 Mod. 249.*

Vol. II.

(f) 381.

[1] *Hill*, Sergeant, said it is very common for certificates to be lost, because the parties save a small fee by not filing them.

(g) 348.

1781.

GOODTITLE
against
FNUCAN.

point.—3. In the former leases, the tenants covenanted to pay all duties and taxes except the land-tax; church-dues particularly, are, by law, chargeable on the occupier; but, by the present lease, the landlord covenanted to free the defendant from tithes, and all levies and payments to the church; these new covenants, therefore, are less beneficial to the remainder-man—(The only proof given, that the covenants in the former leases were as just stated, was an affidavit of a former tenant, which was now put in, and read)—If the rent and covenants, reserved and made, in favour of the reversion, are not as beneficial as the power requires, that will be sufficient to vacate the lease: *Orby v. Monson* (e), *Lord Cardigan v. Montague*, cited in *Atkins v. Horde* (f).

[570]

The Attorney General, on the other side, argued,—1. That the power being recited in the lease, it was manifestly the intention of Earl Washington to comply with the terms of it; and, with regard to the supposed subsisting leases, it had been very reasonably argued at the trial, that the agreement for the new lands was not so properly a lease, as a licence to take the crop, and produce, till the time when it was thought the inclosure would be completed; and it was left to the jury, and they found, that the defendant was in possession of all the premises, at the time of granting the lease. But, it is impossible the construction of the power contended for on the other side can prevail, for, if it should, no lease under such a power could ever stand, unless every tenant under an agreement for a year, or at will, should come in, and make a formal surrender, and remove entirely, with all his effects, from the possession. The cases cited went upon subsisting leases under seal. The words of this power are, “not by way of reversion, or “future interest;” this was not a future interest; it commenced immediately, and the immediate attornment of the then tenants, was the same thing, in substance, as if the defendant had granted them new leases.—2 The qualification in the power, with regard to the reservation of the rent then paid, can only apply to such parts of the subject of the power as were then let, but the power itself expressly extends to the manors and fishery, and it must have been known, at the time of the settlement, that neither the manors nor fishery were at that time let, and that the manors never had been. Where a general authority is given, by a power, to let manors, lands, &c. and, afterwards, there is a qualification, as in the present case, that the usual rent, or the rent for which the lands are then let, shall be reserved, such affirmative qualification shall not restrain the generality of the power, but shall only apply to that part which

(e) In *Canc.* 1705, 1706, 2 *Vern.*
531 542.

(f) *B. R. H.* 30 *Geo.* 2. 1 *Burr.* 60
122.

which had been formerly demised In *Cumberford's Case* (a), the power was, to grant leases of the premises, or any part thereof, for, &c. "so that such rent or more, be reserved upon each lease, as was reserved or paid for the same, (pur-
 ceo,) within two years then next before;" part of the land had not been let within the two years before, but it was held, that such part might be let, reserving what rent the lessor pleased; "for, (says the report,) it appears by the generality of the words, that he has power to lease all the lands, and this does not resemble leases made by force of the statutes of 32 Hen 8. or 13 Eliz. for, in those statutes, the intent is apparent that no land should be leased except what had been let before." The same rule is adopted, and confirmed, in the case of *Walker v. Wakeman* (b) reported by *Ventris* (c) and *Levinz* (d), and is cited as clear law, on the authority of those cases. by Lord Holt, in the case of *Winter v. Loveday* (e). In the case of Lord Mountjoy, which has been cited from *Moore*, and is also reported by Lord Coke, there was no general authority first given, and, in *Tristram v. Lady Baltinglass*, in *Vaughan*, the power of letting is expressly confined "to such of the premises as at any time theretofore had been usually letten or demised (f)." That case was decided a very few years previous to that of *Walker v. Wakeman*, and, if it had established any thing like the doctrine contended for on the other side, would most, undoubtedly, have been cited on that occasion. With regard to the case in *Fortescue*, it never went farther than a reference to a court of law; but according to *Fortescue's* account of it, the authority of *Cumberford's Case*, and of *Walker v. Wakeman*, was not denied, but the Judges distinguished it from them, and thought it resembled the case in *Vaughan*. But, it is objected, that as the rent is entire, and cannot be apportioned, it is not clear that the ancient rent is reserved for that part of the premises which had been formerly let. In answer to this, it is sufficient to observe, that the advance on the whole is 30*l* and that the fishery is only worth 15 shillings per annum, and the manor does not appear to be of any pecuniary value.—3. As to the third point, the power contains nothing about usual covenants. But, besides, it will be found that the alteration in the covenants is beneficial to the remainder-man. The church-dues cannot be equal to half the land-tax, which the tenant is now to pay. If they were, proof of their amount would no doubt have been given at the trial. As to tithes, none are payable; and, at all events, surely the additional 30*l*. is much more than equivalent

1781.

GOODTITLE
against
FUNUCAN.

[571]

(a) T. 10 Car. 1. 2 Roll. Abr. 262. pl.

(d) 2 Lev. 150.

15.

(e) B. R. M. 9 Will. 3. 12 Mod. 147.

(b) B. R. H. 27 & 28 Car. 2.

151. S. C. Carth. 427.

(c) 1 Vent. 294.

(f) Vaugh. 29.

1781.

GOODTITLE
against
FUNUCAN.

equivalent to the new burthens supposed to be imposed on the remainder-man. But, suppose the covenant to pay the church-dues, and tithes, not counter-balanced by the new stipulations in favour of the landlord, *that* covenant will not bind those in remainder. It is a covenant by Earl *Washington*, for himself, his heirs, executors, administrators and assigns.

Hill, Sergeant, in reply, insisted, that no satisfactory answer had been given on the *first* point, a parol lease being equally a *particular* estate with one under seal. As to the *second*, he admitted that there are contradictory authorities, but observed, that the last, in point of time, (*viz.* the case in *Fortescue*,) was in his favour; and it was only an over scrupulous delicacy that induced the Judges, in that case, not expressly to deny the law of *Walker v. Wakeman*. On the *third* point, he said, he thought the remainder-man, or the heir, or executor of the lessor, might be sued on the covenant for tithes and church payments, at the option of the lessee; but, *BULLER, Justice*, said, he thought otherwise; that the lessee had all she had bargained for, by her remedy against the representatives of the lessor, and had agreed, by the terms of the covenant, that it should not run with the land. *ASHHURST, Justice*, seemed to doubt, as to this, and mentioned the case of Sir *John Astley's* leases, where the court had decided that the remainder-man should have the benefit of covenants for rent, though, by the words, the lessee covenanted only with the lessor, *his heirs and assigns*.

The court took time to consider, Lord MANSFIELD saying that he was not prepared to give his opinion, having lost his papers, and the notes he had taken on the former argument [1].

This day, his Lordship, after stating the case, delivered the opinion of the court, to the following effect.

Lord MANSFIELD,—There are three objections made to the validity of this lease. 1. That it was a lease in reversion: 2. That the manors and fishery are not within the power, because they paid no rent at the time of the settlement: 3. That the covenants are not so beneficial to the landlord as those in the ancient leases.—1. On the first head, it was contended, as to the old enclosed lands, that there is no such thing now as a tenant at will; that Earl *Ferrers* could not have brought an ejectment for those lands, without giving six months notice; and that whoever cannot maintain an action of ejectment, is not in possession; and, as to the new allotted lands, that there were several months of the term under the agreement still to run. But *three* answers were given to this objection, every one of which, if valid, is decisive. The first

[1] Probably when his house was burnt by the rioters.

is, that the tenants agreed to this lease, and surrendered their possession, before the execution of it, in order to make it valid. This was expressly left, by Mr. Baron EYRE, to the jury, who found, that the defendant was in possession at the time of the execution. The second answer is, that, if the jury had not found the defendant to have been in possession, still this would be good as a concurrent lease. For this *Read v. Nash* (a) was cited [2], where, under a proviso to grant leases only for 21 years, a lease had been granted in 4 Ph. & Mar. for 21 years, and afterwards, 18 Eliz. a year before the expiration of that lease, another was granted, of the same premises, for 21 years, to begin presently, and it was held, that the second lease was good. The reason given is a strong one, viz. that the inheritance was not charged, in the whole, with more than twenty-one years (b). No authority was cited against this case, nor any answer given to the reasoning in it. The words of 13 Eliz. c. 10. as strongly require ecclesiastical leases to be in possession, and not in reversion, as those in this, or any of the common powers to tenants for life; yet, in the case of *Fox v. Collyer* (c), all the Judges held, that an immediate lease for 21 years, of premises on which there was a subsisting lease for four years, was good. The 18 of Eliz. c. 11. restrained the right to make such concurrent leases, to cases where the old lease had not more than three years to run. The third answer is, that, in respect of the power, all the subsisting leases were leases at will [1]; there was no out-standing lease, as against the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the case of leases under the power, (and these were not, in many respects, according to it,) the possession would devolve upon him, the instant of the death of the tenant for life. Therefore, we are all of opinion against the first objection. 2. As to the second point; powers are now a common modification of property in land, and, as such, are to be carried into effect according to the intention of those who create them. There is no ground or reason of equity or policy, between the tenant for life, and the remainder-man, for leaning on either side. It is apparent, from the statutes of 32 Hen. 8. c. 28. and 13 Eliz. c. 10. that the legislature meant to confine the authority to let, to lands which

1781.

GOODTITLE
against
FNUCAN.

[573]

(a) B. R. T. 31 El. 1 Leon. 147.

[2] Probably on the first argument, which I did not hear.

(b) 1 Leon. 148.

(c) Cam. Scacc. T. 25 El. 1. Anderson. 65. The reporter says, "it had

"long depended in judgment," and the lease must have been granted some time between 13 and 18 El.

[1] This, too, must have been mentioned on the first argument.

1781.

GOODTITLE
against
FUNDUCAN.

[574]

which had been *formerly* letten, and were capable of producing profit. This is the true construction, if not from express words used, yet by necessary implication. In the case of *Bagot v. Oughton*, which has been much relied on, the nature of the thing shewed that the power could not be meant to extend to letting the ancient manor house at all; much less to letting it without reserving any rent. In a *family settlement* of an estate, consisting of some ground always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly *excludes* the mansion house, and lands about it, never let. No man could intend to authorise a tenant for life to deprive the representative of the family of the use of the mansion house. The words, in such a case, shew, that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant for life: He has the occupation of what was always occupied, and the rent of what was always let. We all, therefore, agree; as to the rectitude of the decision in *Bagot v. Oughton*. The nature of the thing spoke the intent, as forcibly as the most direct words could have done. It was demonstration. But where no intent appears, where nothing arises from the nature of the thing, the rule laid down by Lord Holt, in the case of *Winter v. Loveday*, as reported in *Carthew*, applies, viz. "that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification (a)." So, in *Cumberford's Case*, the reasoning was, that, the power being to let all, it would go in destruction of the power to restrain the tenant for life from letting part because it had not been let before; and it was there observed, that the case did not resemble leases under 32 Hen. 8. and 13 Eliz. *Walker v. Wakeman*, is another case equally strong. Thus stand the authorities. Now, to apply them to the present case. The power is express to demise the manors and fisheries. They are particularly mentioned in the settlement [c], and the power goes to the whole. They pay, under this lease, as great a yearly rent, as at the time of the settlement, for they paid nothing then. The words, therefore, are complied with, and this objection could only stand upon intent. But we think no such intent appears. The manors are nominal,—of no value,—no object of yearly income. The fishery only worth 15s. a year.

(a) *Carth.* 429.

[c] That was undoubtedly the case, though, to avoid prolixity, I did not,

in stating the case, set forth the words of the settlement, preceding the power.

a year. They are convenient to the lessee, living on the land, and of no use to the remainder-man. The right of shooting and fishing is reserved to him. For my own part, I think the intent was, to give leave to demise all, reserving as much rent, in the whole, as had been paid before; and, in fact, 30*l.* more has been reserved. 3. The third objection, as to the covenants, was not much relied on, and does not require much consideration. The power makes no mention of covenants. The ground, therefore, must be, that the present covenants are a fraud on the power, by lessening the value of the reservation, but, on considering them fully, it appears, that what is thrown on the landlord is compensated by what is paid by the tenant. She is to pay half the land-tax. As to the church-dues, the covenant seems to be collateral, and not to go with the land, nor to bind the remainder-man; resembling a covenant for quiet enjoyment. But, if it did go with the land, there is no pretence of fraud on the power. The 30*l.* is *bonâ fide* reserved as an increased rent. What is stipulated with regard to tithes is of no consequence, since none are payable. Upon the whole, we are all of opinion, that there is no ground for a new trial.

The rule discharged [✓].

[✓] Vide *Pomery v. Partington*, B. R. T. 30 Geo. 3.

BERNARDI against MOTTEUX.

INSURANCE of freight and goods, upon the ship the *Jane*, (or *Joanna*), at and from *Venice* to *London*, "warranted neutral ship and neutral property." The cause was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after last *Trinity Term*, when a verdict was found for the plaintiff, subject to the opinion of the court, on a case, which stated as follows:

That the defendant underwrote the policy; that the ship was taken by a *French* frigate, called *La Magicienne*, as she was sailing from *Venice* on her voyage to *London*: that the plaintiff offered to give evidence, on the trial, that the property of the ship and the property of the cargo were *neutral*, and that the papers belonging to the ship fell overboard by accident, after she was brought to, by the *French* frigate; but the defendant objected to such evidence being received, and produced, as the ground of his objection, the sentence of the condemnation of the ship in the *French* Admiralty court, which was read, and is as follows:

"ALMERIA. } *Louis Jean Marie De Bourbon*, Duke
 "The *Joanna*. } *De Penthièvre*, Admiral of France.—
 "Seen by us, *The Procès Verbal* made on board the

L 4

"snow

1781.

GOODTITLE
 against
 FURNEAN.

Saturday,
 27th January.
 On an action
 on a policy of
 insurance, a
 condemnation
 by a foreign
 court of ad-
 miralty is no
 conclusive evi-
 dence that the
 ship was not
 neutral, unless
 it appear that
 the condem-
 nation went
 upon that
 ground.

1781.

BERNARDI
against
MOTTEUX.

[577]

“ snow *Joanna*, taken by the King’s frigate *La Magicienne*,
 “ commanded by Mr. *De Boades*, dated the 2d of Decem-
 “ ber last. Signed, *Saint Owey* Steward, *Bouret* Domi-
 “ nico Zané.—Seen by the captain commander. Signed
 “ *Boades*—Purporting, that, the said second of December
 “ last, at five o’clock in the evening, his said Majesty’s
 “ frigate *La Magicienne*, commanded by the said captain
 “ *De Boades*, being ten leagues east of *Cap des Moulins*,
 “ having discovered a snow steering south south-west, the
 “ wind south-west, and having come up with her, and
 “ stopt her, under Venetian colours, after an hour’s chase,
 “ the said Mr. *De Boades* ordered the captain to bring on
 “ board his muster-roll, passport, and bills of loading;
 “ with which order the captain did not readily comply,
 “ under a pretence that the sea was rough, and that his
 “ long boat was leaky; but, being at last obliged to com-
 “ ply, upon threats being made of firing on him, and
 “ being come on board, he declared, that, in getting up
 “ the ship’s side, the box containing his muster-roll, his pa-
 “ tents and passports, had fallen from his pocket into the sea,
 “ and only shewed his bills of loading, by which they
 “ found the said snow the *Joanna*, of 14 men, including
 “ officers, commanded by *Dominico Zané*, of *Venice*, sailed
 “ from *Venice* the 25th of September, with a cargo of 12
 “ bales of silk, dried raisins, oil, cream of tartar, pot-
 “ ash, and other effects mentioned in the bills of loading
 “ by him exhibited, for the account of sundry persons in
 “ *Venice*, consigned to sundry merchants in *London*, whither
 “ he was bound. These goods going into an enemy’s country,
 “ and the loss of his papers which had fallen into the sea,
 “ raising suspicions, the said snow had been stopt, and carried
 “ by his said Majesty’s frigate *La Magicienne*, to *Almeria*,
 “ where she had been put into the hands of the consul,
 “ after the said *Saint Owey* lieutenant acting as steward,
 “ and the said *Bouret* ensign on board the said frigate,
 “ had put their seal on the said snow, where they found
 “ no papers, and taken on board the said ship ten of the
 “ said snow’s crew, which were replaced by six men from
 “ on board *La Magicienne*, and three from the *Atalante*,
 “ with a coasting pilot, who have brought the said snow
 “ into the port of *Almeria*. The premises considered—We,
 “ by virtue of the power delegated to us as aforesaid,
 “ have declared, and declare, as good prize, the ship the
 “ *Joanna*, her tackle, and apparel, together with the goods
 “ of her cargo, and do adjudge them to the captors,
 “ that, in consequence of this decree, the whole be sold,
 “ (if not already done,) in the usual manner, and the
 “ produce divided according to the desire and ordinance
 “ of the King, made the 28th of March 1778. We or-
 “ der, by these presents, the Vice Consul of *France* at
 “ *Almeria*,

" *Almeria*, to look to the execution of this our ordinance,
 " and thereby authorise and command the first tipstaff or
 " serjeant to proceed in all forms requisite thereto.—Done
 " at *Paris*, the 13th of *January* 1779.

" RIGOT."

1781.

BERNARDI
 against
 MOTTEUX.

The question stated for the opinion of the court was, Whether the said sentence was not conclusive evidence against the plaintiff's recovering in this action? If the court should think it not conclusive, then a verdict to be entered for him. If they should think it conclusive, then a nonsuit to be entered.

In the course of the arguments on this case, the third article of the regulations of the marine of *France*, bearing date the 26th of *July* 1778, and also the *procès verbal* made at the time of the capture, though not stated in the case, nor given in evidence at the trial, were so much referred to, and seemed of such weight to the court, that it will be necessary to insert them in this place.

ARRET, For the Regulation of the Marine, &c. 26th *July* 1778.—ART. 3. " ALL vessels taken, of what nation soever, either neutral, or allied, from which it is known that any papers have been thrown into the sea, suppressed, or abstracted, shall be declared good prize, together with their cargoes, upon the mere proof that some papers have been thrown into the sea, without any necessity of examining what those papers were, by whom they were thrown, and even though a sufficient quantity should remain on board to justify that the ship and its cargo belonged to friends or allies."

" PROCES VERBAL of the Venetian snow the *Joanna*, Captain *Dominico Zane*, stopt by the frigate *La Magicienne*, the year 1778, the second of the month of *December*.—

AT five o'clock in the evening, the King's frigate *La Magicienne*, commanded by Mr. *De Boades*, being 10 leagues to the eastward of *Cap de Moulins*, having discovered a snow making her way to the southwest, the wind at east, and having joined him, detained him under Venetian colours, after an hour's chase. The said Mr. *De Boades* gave orders to the captain to bring the list of his ship's company, passport, and bills of loading, on board; with which the captain did not willingly comply, under pretence, that the sea was very rough, and that his boat was staved; but at last he came, upon threats being made to fire on him, and being arrived on board, he declared, that, in getting up the frigate's side, the box in which was contained the list of his ship's company, his patents, and passport, had fallen from his pocket into the sea. He could only show his bills of loading, by which it appeared, that the said snow named the *Joanna*, of 14 men, officers

" included,

[578]

1781.

BERNARDI
against
MOTTEUX.

“ included, commanded by *Dominico Zané*, of *Venice*,
“ sailed the 25th of *September*, loaden with 12 bales
“ silk, dried raisins, cream of tartar, pot-ashes, and other
“ merchandize, (as expressed in the bills of lading, and
“ livered up, and which have been put up in a pack
“ sealed with the King’s arms,) for account of sundry
“ persons of *Venice*, for the address of sundry merchants
“ of *London*, where he was to deliver his cargo. Going
“ into an enemy’s country, and the loss of his papers
“ falling into the sea raising suspicions, *M. de Bac*
“ thought proper to stop him, in consequence of the
“ article of the regulations of the 26th of July 1778, concern-
“ ing the navigation of neutral ships, and to call
“ him to *Almeria*, to be left under the care of the court
“ of *Almeria*, and to be detained until the court of *France*
“ decided the affair.—In consequence of his orders,
“ the lieutenant of the ship, charged with the account
“ and the ensign of the ship, named for the purpose, he
“ gone on board the snow, where we found no papers
“ and caused the door of the cabin, and the hatches
“ to be shut, to which we have set our seal, that no goods
“ may be disposed of. We have likewise ordered
“ men of the crew on our board, whom we have
“ placed by six of our own men, and three from
“ the *Atalante*, with the named *Joseph Nicholas Thurley* com-
“ ing pilot, to conduct her, and secure her navigation
“ with express orders, not to make any insult or mis-
“ behavior in the said snow, under pain of corporal
“ punishment. Done on board. Said *Senante*.”

It was admitted, at the bar, that the sentence had been
appealed from, and affirmed, but nothing new, or special,
appeared in the proceedings on the appeal.

The case was twice argued; first, in *Michaelmas Term*
on *Tuesday*, the 21st of *November*, by *Wood*, for the plain-
tiff, and *Baldwin*, for the defendant; and again, on
[579] day, the 26th of *January*, by *Dunning*, for the plaintiff
(who read the *procès verbal*, and stated, that it had
come from the parties, but had been transmitted from
French court of admiralty, along with the sentence and
other proceedings,) and by *Lee*, for the defendant.

After this second argument, Lord MANSFIELD directed
the cause to stand over, till there should be an opportunity
to apply to the defendant, for his consent, that the
above *Arrêt*, and the *procès verbal*, should be added to the
case.

This day, the defendant’s counsel informed the court
that their client would not consent that the *procès verbal*
should be considered as part of the case.

The arguments on the part of the plaintiff were
effected, as follow:—The sentence of the *French*

1781.

BERNARDI
against
MOTTEUX.

admiralty can only be conclusive on the point directly decided. If this sentence had expressly proceeded on the ground of the property not being neutral, the plaintiff would be bound by it; but it does not appear from the sentence, that the ship and cargo were condemned as enemy's property. On the contrary, it manifestly went on the papers having been wilfully thrown into the sea. This is a ground of condemnation by the law of nations, although the property should be neutral; and by the *Arrêt* of July 1778, the French have gone so far as to subject the ship and cargo to be condemned, if any part of the papers have been thrown into the sea, suppressed, or abstracted, even although sufficient should remain to prove that they were neutral. The truth in this case is, that the papers fell over board by accident, but supposing them to have been wilfully thrown into the sea, that was not a breach of the warranty. Such an act would be fraud, misconduct, or barratry, in the master, and is, therefore, one of the risks expressly insured against. The sentence does not state that the court suspected the property not to be neutral; the suspicions mentioned in it are recited from the *procès verbal*, and are those of the captain of the frigate who made the capture. Independent of any such suspicions, there was a much better ground of condemnation, namely, the *Arrêt*, and it will be impossible to contend, that a condemnation under that *Arrêt* shall operate as conclusive evidence against the plaintiff of the property not having been neutral. One of the causes of suspicion was, that the goods were going into an enemy's country; but the merchants in London, to whom they were consigned, may have been merely factors, and it appears from the sentence, that the consignors were Venetians. The ground of the sentence is at least ambiguous on the face of it, which is reason sufficient, why it should not conclude the plaintiff, who was ready, at the trial, with evidence to shew, that the property was neutral, and that the papers fell into the sea by accident. The sentence was founded on the *procès verbal*. Therefore, though only part of it is there recited, the whole ought to have been read at the trial, as a necessary part of the proceedings, and it should now be considered as part of the case. Thus, a decree in Chancery, which only recites so much of the proceedings as are thought necessary to be set forth to introduce the decretal part, cannot be read in evidence without the bill and answer, because ambiguities may be thereby explained, and omissions supplied [1]. If the *procès verbal* is taken as part of the case, it will shew,

[580]

[1] By this argument, and indeed throughout, the plaintiff's counsel treated the *procès verbal* as in the nature of a libel on which the suit had proceeded.

1781.

BERNARDI
against
MOTTLEUX.

shew, clearly, that the ground of condemnation was the *Arrêt*.

For the defendant, it was contended, that, taking the whole sentence together, the condemnation appeared clearly, to have been made on suspicions that the property belonged to the enemy. The words of the sentence are "*The premises considered*." What premises, but all the circumstances before stated as the cause of the suspicion. If it had proceeded on the *Arrêt*, there would have been no occasion to say any thing of the suspicions. It would have been sufficient, barely to refer to the *Arrêt* itself, after stating as a fact, that *some* of the papers had been thrown into the sea. It is true, the sentence does not, in words, declare the ship and cargo to have been condemned, as *enemy's property*; but it is not the practice to do so, and it amounts to the same effect, if *that* appears from necessary inference, to have been the ground of condemnation. The usual cause of condemnation, in these countries is, that the property belonged to an enemy, and, therefore, when there has been another ground, it should be set forth. Now, in this sentence, *the court* does not even say, that they suspected, or believed, the papers to have been thrown into the sea. If they had said so, such an act is, in all cases, evidence of enemy's property, and they ought to be considered as having proceeded upon it as evidence only, and to have condemned the ship and goods, under the general law of nations, not under a local ordinance not referred to in the sentence.

[581]

After the first argument, Lord MANSFIELD said,—The first principles are clear, and admitted. All the world are parties to a sentence of a court of admiralty. Here there is a *monition* published at the *Exchange*, and, in other countries, at some place of general resort, and any person interested may come in, and appeal, at any time, there has been no *laches*. If there *has*, the time of appeal is limited. But the sentence, as to that which is without it, is conclusive against all persons, unless reserved to the regular court of appeal [1]. It cannot be converted, collaterally, in a civil suit. The difficulty here is, what the ground was on which the *French* court of admiralty went; whether, the ground of enemy's property, or that of the papers having been thrown over board. By the maritime law of all countries, throwing papers over board is considered as a strong presumption of enemy's property, and upon that principle the *Arrêt* of 1778 is founded. But, in all my experience in *England*, I have never known a condemnation on that circumstance only. It is made use of as a strong ground of suspicion. The *Arrêt* is very rigid. It is difficult to find out what the

[1] Vide *supra*, *Walker v. Witter*, 6. n. [1].

1781.

BERNARDI
against
MOTTEUX.

ground of this sentence was. I *incline* to think, the court went upon the ground of *enemy's property*, and considered the want of the papers as a strong presumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and upon the whole, enough does not appear on this obscure sentence, to ascertain precisely upon what it was founded, and some other method ought to be taken to inquire what the ground of it was. As to whatever it *meant* to decide, we must take it as conclusive.

WILLES, and ASHHURST, *Justices*, concurred with his Lordship.

BULLER, *Justice*, said, that, to be sure, the sentence was obscure, but, taking it all together, he did not think there was much difficulty in discovering the grounds of it. The two circumstances of the cargo being consigned to the enemy, and the *falling* of the papers into the sea, are stated as the grounds of suspicion. The latter circumstance,—papers *falling* into the sea,—could not be a ground of condemnation. The other could raise no other suspicion, nor a presumption of any thing else, but the property being enemy's property. It follows, therefore, that the condemnation went upon that ground. If it had gone upon a *wilful throwing* paper over board, *that* would have been stated, substantively, as the ground. In the first place, lay the *Arrêt* out of the case; and then wilful throwing papers over board, is only presumptive evidence of enemy's property. Then, take the *Arrêt*; still wilful throwing over board might have been used as evidence of enemy's property, or it might have been a substantive ground under the *Arrêt*: Here it is not stated as a substantive ground.

[582]

On the second argument, Lord MANSFIELD said, that, the *procès verbal* should be agreed to be made part of the case, it would clearly explain the ambiguity of the sentence, as it set forth the ground for taking the ship to have been the *Arrêt* of July 1778. Without the *procès verbal*, the sentence, he said, was equivocal; it took all; and it was difficult to say, what it went on. If the papers produced to the captor were fair, the property was neutral. But, the *procès verbal* put the ground of the sentence out of all doubt.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, also declared, that he thought the *procès verbal* must be taken as part of the proceedings, and, that expressly referred to the *Arrêt* as the ground of the capture, and the sentence was consistent with it, the sentence must be taken to have been founded on the *Arrêt*. But he adhered to his former opinion, *on the case stated without the procès verbal*, namely, that the interpretation

1781.

BERNARDI
against
MOTTEUX.

pretation of the sentence, taken by itself, must be, that the condemnation went on the ground of enemy's property, and was, therefore, conclusive against the plaintiff.

Lord MANSFIELD then said, if the defendant would not consent that the *procès verbal* should be made part of the case, there must be a new trial. Upon this, *Dunning* observed, that it would be hard upon the plaintiff now to grant a new trial, for that his witnesses were gone to *Venice*, and the terms on which the case was reserved for the opinion of the court were, that, if the sentence should be thought not to be conclusive, a verdict should be entered for the plaintiff.

The refusal of the defendant was signified, this day, by *Lee*, who assigned as the reason for it, that the *procès verbal* was not a proceeding in the *French* court of admiralty, but merely an account of what passed on the capture, reduced into writing, at the time. He observed, that, in the sentence, all the *procès verbal*, except the concluding part, which refers to the *Arrêt* of *July* 1778, was recited, and he thought this afforded a strong argument for inferring, that the court had purposely omitted that part of it, to shew that they did not condemn the ship on the ground of the *Arrêt*.

[583]

Lord MANSFIELD disapproved much of the defendant's refusal, but he said he thought the justice of the case might still be got at, on the ground of the ambiguity of the sentence, which did not mention a word about the property being *enemy's property*; that it was clear the *French* admiralty meant to proceed on the ground of *throwing the papers overboard*; and he agreed with the counsel for the plaintiff, that the *procès verbal* ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.

BULLER, *Justice*, thought, there was weight in what had been observed by *Lee*, on the reason for omitting the concluding part of the *procès verbal*, in the sentence. Indeed it was not clear that what was now offered to be produced, was the same *procès verbal* which the sentence recites, and, if it could be supposed that the captain had made another, omitting the reference to the *Arrêt* as the ground of capture, that could only be accounted for, by his having found that the capture could not be supported on that ground.

WILLES, *Justice*, thought it most manifest, that the *procès verbal* made at the time of the capture, was that on which the sentence proceeded. The sentence began with mentioning it, and recited it exactly, as to date, and every thing else, as far as it went. The word "*purporting*" did not require a recital of the whole, and it was not necessary

necessary for the admiralty court to set forth the captain's reasons for detaining the ship. He had all along been of opinion that the sentence was so ambiguous, that it did not appear that the cause of condemnation was that the property was not neutral, and, therefore, had thought evidence necessary to explain it.

ASHHURST, *Justice*, concurred, as to the ambiguity of the sentence, and that it was, therefore, not conclusive; and, on that ground, Lord MANSFIELD, and WILLES, and ASHHURST, *Justices*, declared their opinion that the *Poslea* ought to be delivered to the plaintiff; *Lee* still urging the danger of opening the sentences of foreign courts of admiralty, which are usually informal, and expressing his apprehensions, that the consequence of this determination would be, that, in all cases of this sort, there would be controversies about the ground of the foreign sentence. On this, Lord MANSFIELD said, that this supposed inconvenience would be entirely obviated, if the foreign courts would say, in their sentences, "*Condemned as enemy's property.*"

The *Poslea* to be delivered to the plaintiff [† 117].

[† 117] *Vide* *Mayne v. Walter*, B. R. H. 24 Geo. 3. *Salucci v. R. E.* 22 Geo. 3. *Barzillay v. Lewes*, B. R. H. 25 Geo. 3. *B. R. T.* 22 Geo. 3. *Salucci v. Wood-*

1781.

BERNARDI
against
MORTEUX.

GOODTITLE *against* NORTH and Others.

[584]

ACTION of *trespass* for *mesne profits*, against several defendants: *Plea* by two of them, (husband and wife,) that the husband became a bankrupt after the cause of action accrued: General *Demurrer*.

Davenport, in support of the demurrer, contended, that the statute of 5 Geo. 2. c. 30. which gives this plea, only speaks of *debts* due before the bankruptcy, and an injury by entering the plaintiff's close cannot constitute a debt. A party cannot in any case of a *tort* liquidate his own demand for damages, and swear to it before the commissioners. It can only be ascertained by the intervention of a jury. The rent is not a sure criterion. He had known, he said, more than five years' rent given by a verdict, for only one year's possession. No debt, therefore, could have been proved, for this cause of action, under the commission, and therefore the bankruptcy was no bar.

Baldwin, for the defendants, admitted, that bankruptcy is no bar to demands for torts in general. But, here, he said, though the *form* of the action was *trespass*, yet the demand, in *substance*, was for a debt, *viz.* the annual

Thursday,
1st February.
Bankruptcy is
no plea in bar
to an action of
trespass for
mesne profits.

1781.

GOODTITLE
against
: NORTH.

annual value of the land, and might have been the subject of an action for use and occupation, in bar to which he insisted that the bankruptcy was most clearly pleadable.

Davenport, in reply, seemed to agree, that, to an action for use and occupation, bankruptcy may be pleaded; and he said, that, in a case argued some time ago in this court, it had been decided, that a party who goes for *mesne* profits after a judgment in ejectment, may waive the trespass, and bring an action on the case for use and occupation. But he contended, that when he does not waive it, the amount of his demand, or what a jury might think him entitled to, is uncertain; many things may increase the amount of the damages, as particular circumstances of inconvenience to the plaintiff from having been kept out of possession, &c.

Lord MANSFIELD, — The form of the action is decisive. The plaintiff goes for the whole damages occasioned by the tort, and when damages are uncertain, they cannot be proved under a commission of bankruptcy [† 1].

[585]

WILLES, *Justice*, of the same opinion.

ASHHURST, *Justice*, — The plaintiff goes for a compensation in damages, the amount of which is uncertain, and cannot be sworn to before the commissioners, but must be ascertained by a jury upon all the circumstances.

BULLER, *Justice*, — The damages here are as uncertain as in an action of assault.

Judgment for the plaintiff [† 118] [† 2].

[† 1] But if the demand is such, that the amount can be liquidated and ascertained, without the intervention of a jury, it is a debt that may be proved. *Utterton v. Vernon*, B. R. H. 30 Geo. 3. 3 Term. Rep. 539.

[† 118] *Vide Johnson v. Spiller*, B. R. H. 24 Geo. 3. *supra*, p. 167. col. 2. Note [† 55].

[† 2] *Vide*, also, *Gulliver v. Drinkwater*, B. R. H. 28 Geo. 3. 2 Term. Rep. 261.

Thursday,
1st February.

LORAINÉ against TOMLINSON.

When a ship is insured for 12 months at the rate of so much per month, though the risk cease at the end of two months, there shall be no apportionment nor return of premium.

THIS was an action tried before Lord LOUGHBOROUGH, at the last Assizes for the county of Northumberland, in which the plaintiff declared, — That the defendant, in consideration that the plaintiff, at his instance and request, had underwritten several policies of assurance as to certain sums of money therein subscribed against his name, on the ships, merchandizes, and other things therein respectively specified, without receiving the full premiums therein mentioned, undertook and promised to pay the plaintiff so much money as the premiums therein mentioned to be paid to him amounted to, with an averment

1781.

LORAINÉ
against
THOMLIN-
SON.

verment that they amounted to 40*l*.—There was another count for 40*l*. for money had and received by the defendant for the plaintiff's use.—The defendant *pleaded non assumpsit*, to all except the sum of 3*l*. upon which plea issue was joined; and, as to the 3*l*. he *pleaded a tender*, and paid that sum into court. Upon the plea of tender, issue was also joined.

The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l*. subject to the opinion of the court, whether he was entitled to recover that sum of 15*l*. or the sum of 3*l*. only, upon a case, which stated, in effect, as follows:

The plaintiff had underwritten 200*l*. on a policy effected at Newcastle, (which was set forth *verbatim* in the case,) whereby the ship the *Chollersford* was insured, against capture by the enemy, for twelve months, in the coasting trade between Leith and the Isle of Wight; beginning the 13th of March 1779, and ending the 13th of the same month 1780. In the body of the policy, it was stated, "That the assurers confessed themselves paid the consideration due unto them by the assured, at and after the rate of 15*s*. per cent. per month." At the bottom, opposite to the plaintiff's subscription, was written "Premium received 16th March 1779;" and, on the back, was indorsed, "Newcastle, 15 March 1779, Mr. John Gaul Thomlinson, on his ship the *Chollersford*, himself master, for twelve months, in the coasting trade, at and between Leith and the Isle of Wight, beginning the 13th of March 1779, and ending the 12th of March 1780. Enemy only. At 15*s*. per cent. per month, 18*l*." The

[586]

premium was not paid, though expressed in the policy to have been paid, it being the usage in Newcastle not to pay the premium at the time of making the insurance, but at various times after the policies are effected, and, sometimes, not till twelve months after. The ship was lost in a storm, within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff 3*l*. as the premium for two months. The case farther stated, that one *Rogerson*, a broker, one of the witnesses for the plaintiff, swore, that at Newcastle, at the time when this insurance was made, the rate of premium, on the same voyage and against the same risk, varied in proportion to the duration of time for which the insurance was made; that the usual rate was 1*l*. 11*s*. 6*d*. per cent. per month, if the insurance was for three months; 1*l*. 1*s*. per month, if for six months; 18*s*. per month, if for nine; and 15*s*. per month, if for twelve months. That the reason of the difference was, that, when the time was long, the ship would probably be in port for a great portion of the time; that, on similar policies, when

1781.

LORAINÉ
against
THOMLIN-
SON.

the capture had happened within the year, the whole *premium* had been paid. The defendant's witnesses, on the contrary, swore to two or three instances like the present, where there had been an apportionment and abatement of *premium*; that, when the policy was meant to be for a year, the rate was usually computed by months, the reason for which, they believed, was, to ascertain the proportion to be returned if the risk should cease before the end of the whole time insured.

J. Scott for the plaintiff.—Wood for the defendant.

Lord MANSFIELD desired Wood to begin.

He contended, that this was not one entire contract for a year, but an insurance from month to month for twelve months. Even on an insurance for an entire voyage, when the assured can ascertain the proportion of the *premium* allowed for that part of the voyage during which the risk ceased, there must be a return to that amount. It was so determined in *Stevenson v. Snow* (a). The court there, laid it down, as a principle in cases of insurance that "equity implies a condition that the insurer shall not receive a price for running a risk, when he in truth runs none." If the policy had been for a year, or twelvemonths, and the *premium* a gross sum, the court could not have apportioned it, because the risk, in one month, might be greater than in another; but here the parties have apportioned the *premium*. This distinguishes the present case from that of *Tyrie v. Fletcher* (b) [†119] where it was held, that there could be no apportionment because the insurance was for an entire year, and the *premium* one gross sum. The court decided that case on the ground of the contract being entire. In the present case the insurance was the same as if there had been twelve policies, one for each month. It is true, that, with regard to each month, if the risk had ceased in the middle of any of them, on the principle on which *Tyrie v. Fletcher* was decided, the court could not apportion the *premium* for different portions of that month. The only purpose the parties could have for mentioning the monthly proportion, both in the body of the policy, and in the indorsement, must have been to ascertain the sum to be returned in case of a capture within the year. If it had been meant to be an entire contract, the *premium* would have been fixed at 18*l. per annum*, without any mention of months. The usage of the place, as proved by the defendant's witnesses, is according to the construction for which he contends.

(a) B. R. M. 2. Geo. 3. 3 Burr. mon v. Woodbridge, T. 21 Geo. 3. 1 Black. 315. 318. infra, p. 781.

(b) B. R. M. 18 Geo. 3. Vide Ber- [†119] Since reported, Comp. 66

Lord MANSFIELD told *Scott*, he had no occasion to give himself any trouble.

Lord MANSFIELD,—This is a mere question of construction, on the face of the instrument, and, therefore, parole evidence should not have been admitted to explain it. It is an insurance for twelve months, for one gross sum of 18*l.* They have calculated this sum to be at the rate of 15*s.* per month. But what was to be paid down? Not 15*s.* for the first month, and so from month to month; but 18*l.* at once. Two cases have been mentioned. *Stevenson v. Snow* was decided on the ground of there being two voyages. *Tyrie v. Fletcher* is directly in point against the defendant. There are two principles in these cases; 1. If the risk has never begun, the whole premium is to be returned, because there was no consideration; 2. When the risk was begun, there never shall be a return, although the ship should be taken in twenty-four hours.

ASHHURST, *Justice*,—The 15*s.* per month is only a mode of computing the whole sum.

WILLES, and BULLER, *Justices*, of the same opinion.

The *Postea* to be delivered to the plaintiff [†120].

[†120] *Vide Meyer v. Gregson*, B. R. E. 25 Geo. 3. *Long v. Allan*, B. R. E. 24 Geo. 3. *Gale v. Machell*, B. E. 25 Geo. 3.

The KING against DAVIE and seven Others.

ON the first day of last *Michaelmas Term*, *Dunning* obtained a rule to shew cause, why an information should not be filed against the defendants for a conspiracy to elect *Davie* mayor of the borough of *Lyme Regis*, in an illegal manner, for the purpose of making certain persons without title, corporators, and, thereby, to procure a colourable majority in the corporation, and, by means of this majority, to disfranchise others, well intitled to be corporators, in order to obtain an undue influence in the election of members to serve in parliament for the borough.

On making the application, *Dunning* stated, from *affidavits*, that the persons disfranchised by the defendant had been twice before removed, and restored by *mandamus*; that the last disfranchisements were on the same grounds of objection which had been over-ruled, on argument, upon the returns made to the *mandamuses* to restore; that the same objections applied equally to the titles of some of the defendants themselves; and that, (as the persons making the *affidavits* believed,) the defendants had acted

1781.

LORAINÉ
against
THOMLIN-
SON.

[588]

Thursday,
1st February.

The court will not grant an information against the magistrates of a borough for having disfranchised persons intitled to their freedom, although sworn to have been done to serve election purposes, if the defendants deny that motive, and swear that they thought there was a legal ground for the disfranchisement, and the ground on which the

disfranchisement went has not been decided.

1781.

The KING
against
DAVIE.

[589]

in this illegal manner with a view to procure a colourable majority of votes in the election of the members for the borough.

On *Wednesday*, the 31st of *January*, *Beacroft*, *Arden*, *Lawrence*, and *Erskine*, shewed cause against the rule; and produced *affidavits* of the defendants, expressly denying the corrupt motives imputed to them, and swearing that they thought they had a legal ground for the act complained of, and that the last disfranchisements were expressly with a view to have the question decided whether non-residence is a good cause for amoving a capital burgess.

This day, the *Attorney General*, *Lee*, *Dunning*, and *Rooke*, were heard in support of the rule.

Lord MANSFIELD, — This prosecution is not attempted with a view to obtain any civil recompence, or to assist the disfranchised members of the corporation in being restored, for it is acknowledged that their party have now obtained a complete victory in the borough. The application is therefore *ad vindictam*, and *ad vindictam* only. There are undoubtedly cases where the exercise of a discretionary authority, by a magistrate, with a corrupt motive, in order to serve election purposes, will be a ground for granting an information. If, for instance, licences are refused to publicans, as in the case from *Corfe-Castle* (a) if a rate is partially made, and persons corruptly left out or put on; if freemen without title are admitted; if electors are arrested coming to vote, &c. But, what is the charge? That persons have been admitted who the defendants swear they thought had a title, and others removed who they swear they thought had none. To grant an information in this case would imply an opinion that such a proceeding is a punishable crime. Now, there is no instance even of an indictment for it. There is great tenderness in granting informations in matters of election. How many instances do we recollect of mayors acting as returning officers after there has been judgment of *custia* against the mayor under whom they derived their title, as at *Wigan*, *Marlow*, *Caxmarthen*, &c.? Yet no information has ever been granted in such a case. For the civil injury, when a corporator has been improperly removed, there is a specific remedy by a *mandamus*, and an action for a false return. Where a person, not intitled intrudes, he may be removed by an information in the nature of *quo warranto*, and fined for his usurpation. If you would proceed criminally, prefer an indictment. That is more proper for a precedent. But how is corruption proved? For the application, the belief of corrupt motives is sworn to, but the defendants positively deny the motives so imputed to them. The former restorations

(a) *Rex v. Hann*, T. 5 Geo. 3. 3 E. 2 Geo. 3. 3 Burr. 1317.
Burr. 1716. S. P. *Rex v. Williams*,

not go upon the merits. The question, whether non-residence is a cause for disfranchising a capital burghess, (which was the ground of the motions complained of,) has never yet been tried. It is now clear that all the capital burghesses are of the council, yet, on the returns to the different *mandamuses*, that was disputed, and the contrary maintained on the part of the prosecutors; though they, being possessed of the charter, knew it to be so [†121]. I think the rule must be discharged.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—When corporators combine, and corruptly prostitute their office to election purposes, I agree that such a case is a proper subject for an information. But the corruption should be made out. The defendants here positively deny the particulars of the charge, and the question concerning non-residence has never yet been decided. The defendants swear they believe it to be a solid ground of motion; that they have used every means to bring it to a determination, but hitherto without success. As that point is yet undetermined, I should think it would be improper to suffer an information to go.

The rule discharged.

[†121] *Supra*, p. 182. note [19].

The KING against Lord GEORGE GORDON.

Monday,
5th Feb.

AN indictment for high treason having been found against Lord George Gordon, the *Attorney General* moved, in the last term, (on *Saturday*, the 11th of *November*,) for a rule upon the sheriff of *Middlesex*, to deliver to the prosecutor a list of the jurymen he intended to return on the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner, (according to the provision of the statute of *Queen Anne* (a),) at the same time with the copy of the indictment. He said, this seemed the only method of complying with the meaning of the statute. The words are, That a list of the witnesses that shall be produced on the trial, for proving the indictment, and of the jury, mentioning the names, &c. be delivered to the party indicted, ten days before the trial. This, he said, had been construed to mean, before the arraignment [1], and, as there is no issue till arraignment, there

A person indicted for high treason is entitled to a copy of the indictment and lists of the witnesses for the Crown, and of the jurymen who are to be returned on the panel, ten days before his arraignment. —It is high treason to attempt, by intimidation and

can violence, to compel the repeal of a law.—The statute of 13 *Car. 2. c. 5. § 2.* is not repealed by 1 *W. & M. sess. 2. c. 2. § 1. art. 5.*—A witness is not obliged to answer whether he is a *Roman Catholic*.—Copies of the journals of parliament are evidence.

(a) 7 *Ann. c. 21. § 11.*

[1] By the statute of 7 *Will. 3. c. 3.* of which that of 7 *Ann.* is but an extension, a copy of the indictment

was to be given, five days, at least, before the prisoners should be tried, in order to enable them to advise with counsel thereupon to plead and make their

1781.

The KING
against
Lord
GEORGE
GORDON,

can be no jury, strictly speaking, because no jury process can be awarded till issue joined.

The rule was granted [2].

Lord GEORGE was this day tried at bar. The indictment was for levying war against the King. The manner in which the trial proceeded was this. Norton opened the indictment. The Attorney General then stated the case, and produced the evidence for the Crown; the witnesses being examined in their turns, by the different counsel concerned for the prosecution, viz. the Attorney General, the Solicitor General (Mansfield,) Bearcroft, Lee Howorth, Dunning, and Norton. Kenyon then opened the case on the part of the prisoner; after which, Erskine, his other counsel, told the court, he meant to reserve his address to the jury, till after the evidence for the prisoner had been gone through: He said there was a precedent for this, in the State Trials (a). Lord MANSFIELD, upon this, told him, that, as far as he was concerned, he should be glad to hear him at any stage when it was most desirable to himself; and the Attorney General declared that no objection would be made on the part of the prosecution. The evidence was then produced; and Erskine having observed upon it, the Solicitor General replied.

[592]

The case, on the part of the prosecution, was; That the prisoner, by assembling a great multitude of people, and encouraging them to surround the two houses of parliament and commit different acts of violence, particularly burning the Roman Catholic chapels, had endeavoured to compel the repeal of an act of parliament (b).

their defence. This must have meant five days before arraignment, because the prisoner pleads *instante* upon the arraignment.

[2] This provision in the statute of Queen Anne, was not to take effect till after the death of the late Pretender; and this was the first instance in which a person indicted for high treason had been entitled to the benefit of it. The rule was drawn up in the following words:

MIDDLESEX.

The King against
George Gordon, Esq;
commonly called Lord
George Gordon.

It is ordered that the Sheriff of M. d. do forthwith deliver to Mr. Chamberlayne, the solicitor for the prosecutor, a list of the jury to be returned by him, for the trial of the prisoner, mentioning the names, professions, and places of abode, of such

jurors, in order that such list may be delivered to the prisoner, at the same time that the copy of the indictment is delivered to him.—On the motion of Mr. Attorney General.—By the Court."

Immediately after this rule was pronounced, Erskine moved, that the prisoner might have counsel assigned to him, that Kenyon and himself should be assigned, and that they might have free access to him at all reasonable hours, according to the provisions of 7 Will. 3. c. 3. § 1. Buller, Justice, doubted whether this application ought not to be made by the prisoner himself, at the bar, the words of the statute being, "Upon his or their request;" but, the Attorney General consenting, the motion was allowed.

(a) Qu.

(b) Viz. 18 Geo. 3. c. 69.

Lord MANSFIELD, when he began to sum up the evidence, stated to the jury, that it was the unanimous opinion of the court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the king; and high treason. He requested that he might be corrected, if his notes should be deficient in any part, by those of the other Judges, and of the jury; and he concluded by telling the jury, that if the scale should hang doubtful, and they were not fully satisfied of the prisoner's guilt, they ought to lean to the favourable side, and acquit him.

1781.

The KING
against
Lord
GEORGE
GORDON.

The trial lasted from eight in the morning, till a quarter after five of the morning following. The jury withdrew for some time, and then brought in a verdict of acquittal. Lord MANSFIELD, and the other Judges, continued on the bench the whole of the time, till the jury retired.

Some points of law, and of evidence, arose, in the course of the trial.

1. It was contended, by the counsel for the prisoner, that the statute of 13 *Car. 2. st. 1. c. 5.*—(By which it is enacted, That not more than twenty names shall be signed to any petition, &c. to the king, or either house of parliament, for any alteration of matters established by law, in church or state, unless the contents thereof be previously approved of, in the manner therein mentioned; and that no person or persons shall repair to his majesty, or both, or either of the houses of parliament, upon pretence of delivering any petition, &c. accompanied with excessive number of people, nor, at any one time, with above the number of ten persons, on pain of incurring a penalty not exceeding 100*l.* and three months imprisonment (*c.*),—was virtually repealed by that article in the bill of rights which declares, “That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal (*d.*)” But Lord MANSFIELD, in his directions to the jury, said, he had never before heard it supposed, that the act of *Car. 2.* was repealed; and that it was the joint and clear opinion of the whole court, that the bill of rights did not mean to meddle with it at all; that neither *that*, nor any other act of parliament, had repealed it; and that it was in full force.

[593]

2. Some of the witnesses for the crown had given in evidence, that Lord George, in addressing the crowd, either at *Coachmaker's Hall*, or in the lobby of the House of Commons, had alluded to what had passed in *Scotland*, at the time when it was in agitation to extend the benefit of the provisions of the statute of 18 *Geo. 3. c. 60.* to the *Roman Catholics* in that country, and had said; “The *Scotch* car-
“ried

(c) § 2.

(d) 1 *W. & M. sess. 2. c. 2. § 1. art. 5.*

1781.
The KING
against
Lord
GEORGE
GORDON.

"ried their point, by firmness and steadiness;" "The Scotch had no redress, till they pulled down mafs-houses," or "When the Scotch pulled down mafs-houses, they had redress." The *Attorney General* then offered to call witnesses to prove, that mafs-houses had actually been destroyed in *Scotland*. This evidence was objected to, as not having any relation to the present enquiry, or the conduct of Lord *George*, and therefore irrelevant, and inadmissible. But the court over-ruled the objection, on the ground, that the evidence offered would shew what it was that Lord *George* had referred to, and held out as an example, and that it was matter of fact which had an actual existence.

3. A witness being asked, on the cross examination, if he was a *Roman Catholic*, the question was objected to; and the court ruled, that he was not obliged to answer it, because if he were to say he was, his declaration would be evidence against him, and might subject him to penalties.

4. Sworn copies of certain entries in the Journals of the House of Commons, were produced, and read as evidence, on the part of the crown, without being objected to [3].

[3] I, therefore, presume, that sworn copies of the journals of parliament, are clearly evidence; though I have known it disputed. It is a general notion, that copies of nothing but records are admissible [4], if the originals exist; and I remember a motion by *Dunning*, in *M. 12 Geo. 3.* (27 Nov. 1771,) for a rule on the *East India Company*, to shew cause, why they should not permit their original transfer books to be produced, on the ground that copies from them could not be read. He, on that occasion, stated the principle to be what I have just mentioned, and said there had been many nonsuits for want of producing the original journals of the House of Commons. But the court denied the rule to be as he stated it, and mentioned several instances where copies of matters, not of record, are admissible; as copies of court-rolls, of parish-registers, &c.

and Lord MANSFIELD expressly said, that copies of the [594] journals are evidence [†122], and that he particularly remembered their being admitted on a trial at bar in a cause in which he was leading counsel for the late Sir *Watkin Williams Wynne*, against *Middleton*, the sheriff of *Denbighshire*, on an action for a false return. That Mr. *Onslow*, then speaker of the House of Commons, made a point with his Lordship, that the copies should be offered in evidence though nothing would have been so easy in that case as to produce the original journals. The court added, that the reason *ab inconvenienti*, for holding it not necessary to produce records, applied, with still greater force, to such public books as the transfer books of the *East India Company*: for the utmost confusion would arise, if they could be transported to any the most distant part

[4] Lord *Coke* says, "The journals of the House of Commons are records. The book of the clerk of the House of Commons, which is a record, as it is affirmed by act of parliament in anno 6 H. 8. c. 16." 4 *Inst.* 23. The words of the act to which he refers, are, "Except the same be entered of record in the book of the clerk of the parliament, ap-

pointed, or to be appointed for the Commons' House." That the clerk's book means the journals, is clear from several old entries. *Journ. H. of Com.* 25th Feb. 1623-4. vol. 1. p. 673. col. 2. 1 March, 1623-4. ib. 676. col. 1. 12 March, 1623. ib. 683. col. 2.

[†122] Vide *Jones v. Randall*, B. R. H. 14 Geo. 3. *Cowp.* 17.

of the kingdom, whenever their contents should be thought material on the trial of a cause. The rule granted was, to shew cause why copies of those entries in the transfer books, which the party meant to make use of, as relative to the matter in dispute, should not be taken, and read in evidence at the trial; the rule to be served both on the solicitor for the *Company*, and the opposite party.

The correct principle, therefore, seems to be as laid down by Lord Holt in a case of *Lynche v. Clerke*, viz. "That, wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence." 3 Salk. 154.

1781.

The KING
against
Lord
GEORGE
GORDON.

LE CAUX *against* EDEN.

Wednesday,
7th Feb.

THE defendant was captain of a letter of *marque* called the *Enterprize*, and, being on a cruise, fell in with, and took as a prize, a trader called the *Bee*, belonging to Jersey, of which one Fainton was captain, Robine supercargo, and Le Caux, (the present plaintiff,) second mate. They, with others belonging to the *Bee*, were removed into the *Enterprize*, and brought to England; and the court of Admiralty restored the ship and cargo, and condemned the captor, in costs and damages. After this, Fainton, Robine, and Le Caux, brought separate actions of trespass and false imprisonment, against Eden; to which he pleaded the general issue; and they all stood in the paper of causes to be tried before Lord MANSFIELD, at the Sittings after Michaelmas Term, 20 Geo. 3; *Fainton v. Eden & Robine v. Eden*, by special juries, and *Le Caux v. Eden*, by a common jury. *Fainton v. Eden* came on first, on Friday, the 17th of December, 1779. The counsel for the plaintiff pressed, that the jury might be directed to assess damages upon a case to be made, subject to the opinion of the court. Lord MANSFIELD said, he thought the action a new attempt, which, if it succeeded, would destroy the British navy. If an action at law should lie, by the owners, and every man on board a ship taken as prize, against the captor, and every man on board his ship, no man would dare to take a ship. He thought a doubt made, and the pendency of such a question, especially if large damages were given, would have very bad effects, and obstruct the necessary operations of the sea-service; and, being clearly of opinion, that no such action had ever been sustained; that he himself had frequently ruled that such an action would not lie; and that, upon principles of law, convenience, and sound policy, and also upon the authority of precedents, such an action could not be maintained, he refused to direct the jury to make a case, or find a special verdict. The plaintiff might move for a new trial; the jury

An action will not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted.

[595]

1781.

LE CAUX
against
EDEN.

jury might find a special verdict, if they chose so to do; but he advised them to find for the defendant which they did. *Robine v. Eden* stood next in the paper and came on immediately after; when the counsel for the plaintiff combated the opinion Lord MANSFIELD had given in the former cause with great warmth, and earnestly pressed the jury to find for the plaintiff. Lord MANSFIELD adhered to his former direction, which the jury followed, and found for the defendant. *Le Caux v. Eden* stood lower in the paper, and did not come on till Wednesday, the 22d of December. Lord MANSFIELD, understanding that the counsel for the plaintiff persisted strongly that the action lay, and, instead of moving for a new trial, meant to tender a bill of exceptions, told them, he would consent to a special verdict. He mentioned his opinion to the jury, and said, as to that point, it was agreed by both parties, that they should find a special verdict; therefore they were to assess damages, supposing the action to lie. The jury, who had heard what had passed in the other two causes, had probably formed a judgment of their own, and they found for the defendant. They were again told, it was agreed they should find a special verdict, and assess damages for the plaintiff, and they were sent back. At last, with great reluctance, they found one shilling damages.

The special verdict stated as follows:

“ On the 29th of October, 1778, the plaintiff was the
“ second mate on board a certain ship or vessel called the
“ *Bee*, of which *Fainton* was then master, and, as such
“ mate, the plaintiff on that day was proceeding on a cer-
“ tain voyage, in the said ship, from certain parts beyond
“ the sea, to wit, from the harbour of *Paspibiac*, in the bay
“ of *Châleurs*, on the coast of *Canada*, to the island of *Jer-*
“ *sey*. The defendant was, on the same day, captain or
“ commander of a certain ship of war, or letter of marque,
“ called the *Enterprize*, and was then cruising on the high
“ seas, and, on the same day, attacked, and, after ex-
“ amining all the papers, and documents, relating to, or in
“ any wise respecting, the said ship the *Bee*, her owners,
“ cargo, and destination, seized the said ship the *Bee*, as a
“ prize, and caused the plaintiff to be removed, together
“ with others of the men, out of her, to and on board the
“ *Enterprize*, and kept and continued him on board there-
“ of, until her arrival in *England*. A suit was thereupon
“ commenced, in his majesty's *High Court of Admiralty* of
“ *England*, by *John Fiott*, who claimed the said ship,
“ called the *Bee*, and all the goods, wares, and merchan-
“ dises, therein laden at the time of her being so taken
“ and seized, and, on the 4th of *March* 1779, the Right
“ Worshipful *Sir James Marriot, &c.* condemned the de-
“ fendant, the captor, in costs and damages, and referred

[596]

“ the

"the same to the Register of the same court, taking to his assistance two merchants, who were to make their report thereon. The Register afterwards made his report as follows."

1781.

LE CAUX
against
EDEN.

(The report, which was set forth *in hæc verba*, contained allowances under different articles; *viz.* for the passage of passengers, for the sailors wages from the time of the capture till their arrival in *Jersey*; for their expences in the intermediate time; a particular sum to two of them who had been carried to *France*, and detained as prisoners, at so much *per month* during their stay there; for the captain's expences; for sundry ship's materials missing; for repairs to the ship; for *Robine's* expences; for the loss of part, and damage done to the rest, of the cargo, and the diminution in the produce, by the loss of the market; for demurrage; interest on two bills of exchange; for insurance on the ship, freight, and remaining part of the cargo, from *England* to *Jersey*; for commission on the value of the ship and cargo; and for the expence of the reference.)

"The said ship called the *Bee*, hath been restored to the said *John Fiott*."

This case,—(together with rules which had been obtained for new trials, in the two other causes, on the ground of misdirection)—was twice argued: once in last *Michaelmas* Term, on *Tuesday*, the 14th of *Nov.* by *Cowper*, for the plaintiff, and *Lawrence* for the defendant: and again, this day, by *Dunning*, for the plaintiff, and *Lee*, for the defendant.

The substance of the arguments of the counsel, on both occasions, was as follows.

[597]

For the plaintiff,—1. It was proved by the plaintiff, that the defendant took him by force, from a situation in which he was following his lawful employment. *Primâ facie*, this was, unquestionably, a trespass and assault. Nor will the mere circumstance of its having happened at sea, make any difference; for actions are, every day, brought, and supported, for trespasses and assaults at sea. The defendant, therefore, must now insist, as he did at the trial, that he is not liable to this action, because the ship was taken *as prize*; and this, although it has been decided, by the sentence of the court of Admiralty, that she was not lawful prize, and that he was not entitled to take her. The ground of the defence must be, that, on principles of policy, or adjudged cases, there is either no civil remedy for the assault and imprisonment of a person taken on board a ship seized as prize, or, if there is, that the proper and exclusive tribunal for giving redress, is the court of Admiralty, and that the plaintiff either has received, or may receive, a compensation there. The supposed reason of policy against the action, is the inconvenience to the naval service, if a captain,

1781.

LE CAUX
against
EDEN.

[598]

captain, and all the officers and sailors, of a ship of war were exposed to similar actions, at the suit of every sailor and passenger on board every ship seized by them as prize. This argument may, perhaps, be fit to be addressed to the legislature, but cannot operate here. It is a well known maxim, that, for every injury, there must be a remedy. It will hardly be contended, that an action will not lie for wanton acts of cruelty and violence, exercised on the occasion of taking a ship as prize: and, if it will lie in any case, how is the line to be drawn? Besides, the argument of policy, such as it is, does not apply in the present instance; because this defendant is captain of a letter of *marque*, who acts voluntarily, for his own private profit and that of his owners; not, as officers in the navy, under public compulsive authority. As to the other ground, that if there is a remedy, it must not be sought in a court of common law, but in the court of Admiralty, the inconvenience will be just as great before that judicature, for the same multiplicity of suits may arise there. This inconvenience, however, is, in a great measure, imaginary, since actions will seldom be advised, or brought, unless where there has been a real and material injury, and substantial damages are likely to be recovered. But, how is the exclusive jurisdiction of the Admiralty court to be supported and does it not rather seem that they have no consufance of the subject-matter of this action? There cannot be produced an instance where they have taken upon them to assess damages for assaults, imprisonment, or any injury done to the person. In the case of *Rous v. Haffard* (a), the action was trespass for taking the ship, not for the imprisonment of any of the crew. So, in the present case, the allowance has only been for the loss of the voyage, damage to the cargo, loss of time, expences, and wages; not for being forced on board another ship, exposed, perhaps, to the dangers of war, or unhealthy climates, &c. Indeed, how can the Admiralty court attempt to estimate those personal sufferings, and assess a compensation for them without the intervention of a jury, in whom that discretionary jurisdiction is, by the law of *England*, peculiarly vested? Had the ship been condemned as lawful prize perhaps the sentence would have been a bar to this action because, in that case, it would have appeared, from the sentence, that the defendant, in taking the ship, of which the imprisonment of the men is a necessary consequence had done nothing but what he had an authority for, by his letter of *marque*. But, as the case is, he is to be considered as being in the same situation with a sheriff's officer, who arrests one man, upon process against another. Of the costs and damages actually assessed by the Admiralty court

(a) *Vide infra*, p. 602.

1781.

LE CAUX
against
EDEN.

In this case, there is no part allowed to this plaintiff, nor is there any method by which he could compel a distribution, or the payment of any share or proportion to him. Is it not absurd to suppose, that, in any case, in a suit instituted by the owner of a vessel to recover her from the captor, together with his damages for the detention, the court of Admiralty should investigate and apportion the damage sustained by every individual in the ship, from the imprisonment?—2. If we were to suppose the exclusive jurisdiction of the Admiralty to exist, still, as the plaintiff has shewn a *prima facie* trespass, the special matter of the capture as prize, ought to have been pleaded by the defendant, in order to oust the jurisdiction of this court, and it cannot be taken advantage of on the general issue.

The counsel for the defendant,—1. Stated this to be a case where nothing had been done but what was barely necessary for the purpose of bringing the vessel into port, in order that the regular enquiry might be made, whether she was, or was not, lawful prize. They did not deny that the taking was a trespass, for which there was a remedy, but they insisted, that it was so circumstanced as not to be actionable any where but in the court of Admiralty. What might be the case if the captors were guilty of wanton abuse, and unnecessary severity, as nothing of that sort had happened here, there was no occasion to enquire;—(though Lee said, he did not at all admit, that, even in such a case, an action at common law would lie.)—Compensation is due, if any injury has been suffered, but, as the original question was, “prize or no prize,” both *that*, and all the necessary consequences of the capture as prize, belonged solely to the jurisdiction of the Admiralty court, and could only be enquired into there. It is as much a trespass to take a man’s ship, as to take his person: Now, when goods, supposed to be enemy’s goods, are found on board a neutral vessel, the goods only are liable to capture [1], yet, as it is necessary to secure the vessel in order to bring the goods into harbour for condemnation, the owner cannot maintain an action for taking the ship, although the goods should be proved to be neutral, but the Admiralty court, in such a case, would allow damages for the detention of the ship [2]. By parity of reason, why should they not for the detention of the person? To separate the question of “prize or no prize,” and *that* concerning the incidental damages, would be to divide, between two different jurisdictions, the same entire transaction. There are many authorities which establish the position, that, where the original or principal matter is not actionable at common law, neither are the consequences; 3 Co. 53. Cro. El. 685. Carth. 398. 2 Keb. 360.

1 Lev. 1

[1] *Salucci v. Johnson*, B. R. H. 25 Geo. 3. [2] *Ibid.*

[599]

1781.

LE CAUX
against
EDEN.

[600]

1 *Lcv.* 243. 2 *Lcv.* 25. *Molloy, Lib.* 1. c. 4. § 32. p. 73. *Livingston v. Mackenzie*, at Guildhall, before Lord MANSFIELD, 10 *Geo.* 3.—(Lee cited that case from a note of his own.)—As questions concerning prizes chiefly arise between foreigners and *British* subjects, it is highly expedient that they should be decided according to a law, not municipal and peculiar to this country, but generally known and adopted. In almost all the treaties between us and foreign states, it is stipulated, either expressly, or by implication, that all matters relative to prizes shall be determined in the Admiralty court. There is, for instance, an express article to that effect, in the treaty of 1699, between *Great Britain* and *Denmark*, (*Art.* 35.) Another advantage arising from the jurisdiction of the Admiralty court is the expedition of the decision; for by the rules of that court a cause can hardly last beyond a month. If foreigners were obliged to sue at common law, they could very rarely remain in *England*, with their witnesses, the necessary time for the final determination of their cause. But the great convenience is, that all parties concerned may join in one libel, whereas, if the action at law could be supported, the costs alone of the numberless suits to which every individual among the captors would be exposed would, independent of damages, be sufficient to deter every man of common prudence from entering into the service. It would certainly, with regard to privateers, and letters of *marque*, have the effect of a prohibition. It may be true that this plaintiff was not a party to the suit in the Admiralty, but he might have been, or any of the persons interested might have sued on behalf of himself and all the rest. An instance of a libel of that sort may be found in the printed appeals, in the year 1764, in the case of the ship *Le Vigilant*. Though, perhaps, no direct case can be mentioned of an assessment of damages in the Admiralty court, *eo nomine*, for the personal injury of imprisonment; yet the 6th and 7th standing interrogatories exhibited in order to ascertain the damages are so general, that any sort of personal injury might be stated in answering them. In the 4th *Institute*, 134: it is laid down, that the Admiralty has jurisdiction over “contracts, pleas, and *querelles* upon the “sea,” which last expression seems to include personal trespasses; and the same doctrine seems to be recognized in 1 *Roll. Rep.* 250. and 3 *Blackst.* 106, 107.—2. With regard to the plea, the facts which come out, upon the plaintiff's own case, shew, that this is not a trespass at common law, and, therefore, the general issue is sufficient; the plaintiff has failed in proving his case, and ought to have submitted to a nonsuit.

Lord MANSFIELD did not go into the argument at large, but adhered to the opinion he had so repeatedly and per-

1781.

LE CAUX
against
EDEN.

[601]

remptorily given at *Nisi Prius*; and probably thought it more decent to leave the discussion of it to the other judges.

WILLES, *Justice*,—Under all the circumstances of this case, as stated in the special verdict, I am of opinion, that the action is not maintainable. I may perhaps go upon narrower ground than the rest of the court, but the rule I would lay down is, that, where the injury is the necessary and natural consequence of the capture, the court of Admiralty has the sole and exclusive jurisdiction. The cases cited go to establish that principle. I must decide upon the facts as found by the verdict, which are merely, that the ship was seized as prize by the defendant, and that he caused the plaintiff, together with others of the crew to be removed from thence into his own ship, and kept him there till their arrival in *England*. Nothing appears to have been done which could have been avoided, consistent with the seizing the ship as prize. I will not say there may not be cases where this court would have a concurrent jurisdiction; if, for instance, personal ill-treatment should be used, not the necessary effect of the capture. Suppose the ship were condemned as lawful prize, but that some of the crew had been used with unnecessary cruelty; I do not know whether, in such a case, the Admiralty would take cognizance of the injury, though it is very remarkable, that no action at law has ever been brought. However, that difficulty does not arise here. It is said, there is no jury, in the Admiralty court, to assess damages for a personal injury, but I see no reason why that court should not judge of such injuries, as well as of those which affect property. They have an adequate method of ascertaining the damages, by reference to the Register, who may call in the assistance of assessors. There is nothing in the supposed difficulty of apportioning the damages. Why may not 100*l.* be assessed to one man, and 1*s.* to another? There has been such an apportionment in this very case. If there is a remedy in the Admiralty court, that is sufficient; and it is certainly a great advantage, that the parties, there, can all join in one libel. It would be of the most dangerous consequence to the sea-service if such an action as this could be maintained.

ASHHURST, *Justice*,—The circumstance of no action having ever been brought is almost decisive, that it has been the general apprehension, that no such action will lie; for the occasions, in time of war, have been innumerable. The inconvenience of entertaining such causes would be intolerable; because every individual in the captured ship might bring a separate action against every man in the crew of the vessel making the capture. The case in

1 *Levinz*

1781.

LE CAUX
against
EDEN.

[600]

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1781.

LE CAUX
against
EDEN.

[601]

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1 Levinz

1781.

LE CAUX
against
EDEN.
*[602]

1 *Levinz* goes on good and solid grounds. It is unnecessary to go into all possible cases, or to say how it would be, if unnecessary personal cruelty were exercised; but where the* Admiralty court has jurisdiction of the original matter, it ought also to have jurisdiction of every thing necessarily incidental.

BULLER, *Justice*.—The question on this special verdict, as it was stated by Mr. *Dunning*, is a plain broad question; namely, whether an action at common law can be maintained for an imprisonment on a capture at sea as prize; and, as it is of general importance, I have taken all the pains I could to look into the books.

There is no case in which it has ever been holden that such an action would lie; and if it could be maintained, there are, in every war such frequent opportunities for it, that it must have happened in every day's practice, or some instances, at least, must have been in the memory of those who have had long experience in *Westminster Hall*; but there is not the smallest trace of such a determination, or even *dictum*, in any court in England.

An universal silence in *Westminster Hall*, on a subject which so frequently gives occasion for litigation, is a strong argument to prove that no such action can be sustained [†125].

But the case does not rest on negative usage only; for there are a current of authorities, from the time of Queen *Elizabeth*, to the present time, all of which agree, that the Admiralty has jurisdiction, not only of the question, "prize or not prize," but of all its consequences; and many of them agree, that the Admiralty has the sole and exclusive jurisdiction, and that the courts of common law have no jurisdiction at all of such questions.

The case most in point with the present is that of *Rous v. Hassard & contra*, argued at the Cock-pit, on the 22d of March 1749, and determined by Lord Chief Justice LEE, on the 2d of April 1750.

The circumstances of that case were these: *Rous*, having a letter of *marque*, on the 18th of December 1741, seized a sloop called the *South Kingstown*, or *Paon*, as prize, and afterwards libelled against her as prize in the Admiralty court in *South Carolina*. She was claimed by a third person, as *French* property, (the war then being with *Spain*,) and the Admiralty court acquitted the ship and cargo. Then, an action of *trespass* was brought against *Rous*, in the inferior court of Common Pleas at *Newport* in *Rhode Island*, for taking the sloop, to which he pleaded "not guilty [1]," and there was a verdict against

[†125] *Lint.* § 108. 2 *Ld. Raym.*
944.

[1] "Captain *Rous*, according to the course of pleading there, (saying "to

1781.

LE CAUX
against
EDEN.

against him, with 8000*l.* damages and costs. On an appeal and cross appeal to the superior court of judicature at *Newport*, the verdict and judgment in the inferior court were confirmed. Then there was an appeal and cross appeal to the court of equity there, which decreed against *Rous*, with 5000*l.* damages and costs; and, afterwards, an appeal by both parties, to the King in council. The reasons, in the printed case on the part of *Rous*, were, 1. That there was no evidence that the claimants were the true and sole owners of the sloop and cargo; 2. That, if the property had been sufficiently proved and established, no action of trespass could lie for the taking this sloop and cargo, because they were taken on the high seas as prize, and the court of Admiralty had not only the sole jurisdiction to determine, whether prize or not, but likewise to determine, whether, upon all the circumstances of the case, the captor ought to pay or be paid costs, and how much, or whether there should be any costs paid at all; and no other court can take cognisance of that question; 3. That there was so probable a cause of seizure, that the court of Admiralty ought to have given *Rous* his costs, though the ship and cargo were acquitted; 4. This reason respected the *quantum* of the damages.

I have a note of this case, as it was cited by Lord MANSFIELD, in the case of *Livingston & Welch v. Macdonald*, at the Sittings in *Middlesex*, after *Trinity Term* 1770. His Lordship after stating the facts and proceedings, said:

"The great question was, Whether an action of trespass would lie, for taking a ship as a prize. Lord Chief justice LEE, having called in two civilians to his assistance, delivered the opinion of the court, that, though, for taking a ship on the high seas, trespass would lie at common law, yet when it was taken as a prize, though taken wrongfully, though it were acquitted, and though there were no colour for the taking, the Judge of the Admiralty was judge of the damages and costs, as well as of the principal matter; and he laid it down as law, that, if such an action were brought in *England*, and the defendant pleaded "*not guilty*," the plaintiff could not recover."

"Unless the distinction which has been made between injuries to property, and injuries to the person, can be supported, such an authority, uncontradicted by any case, *dictum*, repeatedly recognized at *Nisi Prius*, and strengthened by the negative usage of the courts of law, would, of itself, I think, be binding upon us now, and conclude against the plaintiff.

But,

to himself all advantages of giving any special matter in evidence,) pleaded to issue, that he was not

"guilty in manner and form as the plaintiffs had declared." *Vide* Printed case for *Rous*.

Vol. II.

N

[604]

1781.

LE CAUX
against
EDEN.

‘ But, if that case wanted support, there are many authorities which maintain the principle on which that determination is founded.

‘ The cases which are earliest in point of time, have decided, only, that the court of Admiralty *has* a jurisdiction, and not that this court has *none*; but they are founded on a principle, which, in other cases, has been extended to the exclusion of the jurisdiction of this court.

‘ In 43 *Eliz.* it was resolved, “ That, if goods be taken by pirates at sea, though they are sold afterwards on land, yet the Admiralty has cognisance thereof, for that which is incident to the original matter, shall not take away the jurisdiction.

‘ So it was said by the court in 1. *Vent.* 173, and is added, “ That is law, though there were another resolution in *Bingley’s Case*.”

‘ In *Turner & Cary v. Nele*, T. 20 *Car.* 2. 1 *Lev.* 24. 1 *Sid.* 367. (a), one who had letters of *marque*, in the Dutch war, took an *Offender* for a Dutch ship, and brought her into harbour, and libelled her as a prize, and there was a sentence that she was not a prize; and the *Offender* libelled in the Admiralty against the captor, for damage sustained, by hurt the ship had received in port, and a prohibition was prayed, because the suit was for damage done in port, for which, it was said, an action lies at common law; but the prohibition was denied, as the original was a capture at sea, and the bringing her into port, in order to have her condemned as a prize, is but a consequence of it, “ and, not only the original, but the consequences, shall be tried there.”

‘ In *Ridley v. Eggesfield*, 23 *Car.* 2. 2. *Lev.* 25, an action was brought for suing in the Admiralty, against the statutes of Ric. 2. & Hen. 4. and the declaration stated, that the plaintiff libelled there for ship and goods, supposing them taken by pirates on the high sea, and of a coming afterwards to the defendant on the high sea, whereas he purchased them on the land. The goods were contraband, being going to the Dutch in time of war, and taken by a Scotch man of war, and, on a seizure by the defendant, condemned in the Admiralty court in Scotland, and sold to B. who bought them on land, and sold to the plaintiff, in England. All the court agreed that the original cause, being of piracy, belonged to the Admiralty, and, though the goods were condemned in the Admiralty in Scotland, this did not alter the case as to the jurisdiction of the court, but is pleadable in abatement in the Admiralty in England: But neither that, nor a sale on land, altered the jurisdiction, the original matter being piracy, which all comes in question again, and

[605]

(a) There called *Turner & Cary v. Smith*.

sale at land is a matter consequential upon the piracy, and dependant upon it.

'In *Rex v. Broom*, B. R. H. 9 Will. 3. Carth. 398. the same point was resolved.

'And, in 10 Will. 3. in the case of *Brown & Another v. Franklyn*, Carth. 474. the court not only pronounced, affirmatively, for the jurisdiction of the Admiralty court, agreeably to the former cases; but also, negatively, against the jurisdiction of the courts of common law.

'In that case, there was a motion, for a prohibition to the Admiralty, suggesting, that trespass on the case, for conversion of goods, as also the trial of the property of any goods, belonged to the King, &c. and was not to be tried before the Admiral; that, nevertheless, the defendant, being the King's proctor, had libelled against the plaintiffs, in the Admiralty, concerning the property of a certain ship called, &c. and her cargo, &c. whereas the ship was a wreck, in the *East Indies*, and not the property of the *French King*, or any of his subjects enemies of our King, but belonged to subjects of the King of *Portugal*, who was in amity with us, and that the goods came to the hands of the plaintiffs, *on land*, in the *East Indies*. There had been a sentence in the Admiralty court, that all was prize, and, upon that sentence, this libel was founded, charging, that the goods had come to the hands of the plaintiffs, that they had embezzled them, and praying an account.

It was insisted, for the prohibition, that it was unreasonable the plaintiffs should be concluded by the sentence upon the general libel (a), to which they were not parties, neither had they any notice thereof.

'The court inclined, that the plaintiffs ought to have an opportunity to be heard, and to controvert the matter of fact, and, thereupon, a day was appointed to hear a civilian upon this question, viz. Whether the plaintiffs, upon this libel depending against them in the court of Admiralty, might controvert the property there, against the tenor of the first sentence?

'Afterwards, Dr. Lane acquainted the court, that an appeal might be received against such a general sentence for prize, and the appellants would be let in to controvert the right, and disprove the prize; and it appeared, that, in this case, the plaintiffs had appealed.

'Wherefore, and for that the court apprehended, (as it was insisted upon, on the other side,) that "prize or not prize" was a matter not triable at common law, but altogether appropriated to the jurisdiction of the Admiralty, the prohibition was denied.

'The next case, in order of time, was the case of *Key v. Hubbard v. Pearse*, at the Cock-pit, in the time of Lord

1781.

LE CAUX
against
EDEN

[606]

(a) i. e. The first.

1781.

LE CAUX
against
EDEN.

Lord *Wilmington*, which was determined by Lord Chief Justice LEE, and whose judgment I have, in his own hand-writing, as follows:

“ At a committee of council, 31 *January* 1742, The declaration in prohibition is; Whereas the statutes *Ric. 2. &c.* prohibit the Admiralty to take jurisdiction of matters at land, and whereas *Key* and *Hubbard* are natives of *Ireland*, and are merchants, and were true owners of the ship called the *Canary Merchant*, and the goods therein were theirs, and were possessed of the said ship, at the city of *New-York*, eastward of the city; nevertheless *Pearse*, commander of the King's ship, the *Hamburgh*, within the body of the city of *New-York*, did seize, and take out of their possession this *Canary Merchant*.—It then sets forth the libel wherein Captain *Pearse* libels, and sets forth the King's orders of the 11th of *June* 1739, to seize *Spanish vessels*; also an order of council of the 10th of *July* 1739 for reprisals; charging the taking this ship on the high seas, and that it belonged to the subjects of *Spain*, persons inhabiting within the territories of the King of *Spain*.—Whereas, in truth, the ship was taken within the body of the city of *New-York*, and not on the high seas, and whereas it did not belong to the King of *Spain*, any of his subjects, but did belong to the plaintiffs. And then it sets forth their plea, in the Admiralty, to their title to the ship and goods, as subjects of *England*, land, merchants, their being owners, and the seizure thereof at land, and also the seizing of a register, at the *Mediterranean* pass, which the master had, and that they offered to verify this plea by *affidavits*, which were set forth.—Then charges, that the Admiralty refused to receive this plea; and all the proceedings contrary to the prohibition.

“ To this declaration, the defendant has demurred, and the causes of demurrer are,” &c.—[Here were set forth four causes of demurrer, but the fourth only material]—“ 4th Cause;—For that, “ prize or no prize” and the matters in question, are only triable by the law of nations, in the Admiralty, and not by the law of this land.

“ The plaintiffs (protesting, &c.) have joined in demurrer.

“ This is a question on a seizure, made pursuant to the King's order for seizing *Spanish* ships, and the question in this cause was, whether this was lawful prize.

“ This is a question upon prize, I think the common-law court had no right to prohibit. To prove it; in 1730.

“ It is said by the court, “ Inasmuch as the matter is “ prize or not prize,” no prohibition shall go; and

[607]

1781.

LE CAUX
against
EDEN.

in *Carth.* 476. 10 *Will.* 3. *per cur.* "Prize or no prize" is a matter not triable at common law, but altogether appropriated to the jurisdiction of the Admiralty." And that it is so appropriated, appears strongly from the several acts of parliament cited, (at the bar,) in every one of which, where there is any notice taken of the legal proceedings in respect of prizes, they are noticed as in the Admiralty, and, in 6 *Ann.* c. 37. & 9 *Ann.* c. 27. it is plain the legislature considered the jurisdiction to be in the same court, viz. the Admiralty, whether the prize was taken on the sea, in a creek, an haven, or river. The true reason why the jurisdiction is appropriated to the Admiralty, is, that prizes are acquisitions *jure belli*, and *jus belli* is to be determined by the law of nations, and not the particular municipal law of any country. Nor have the counsel cited one instance, where a prohibition was ever granted in a cause of prize. The *Solicitor General* cited *Molloy, lib.* 1. c. 2. § 6. where the author says, that letters of reprisal may issue, not only by the *jus gentium* & *civile*, but by the ancient municipal law of this country; and he mentioned a writ in the *Register*, 129. But that is a writ grounded on the statute of *Magna Carta*, c. 30. which gives power to seize and detain the persons and goods of alien merchants here, till satisfaction is made for injuries done to our merchants abroad. That by no means proves a general power in the courts of law, to exercise a jurisdiction in matters of prize; but only gives power to the court of chancery, to issue a writ for seizing, and detaining, till satisfaction is made, in the case mentioned in the statute. Though, therefore, I do agree that the jurisdiction of a court of Admiralty, generally, is limited to matters arising *super altum mare*, and is, in that respect, local, yet I do not take it to be so in case of prize; for the jurisdiction does not depend on the locality, but the nature of the question, which is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations. It is argued, that the plaintiffs in prohibition, have, by their declaration, made a case which shews that the ship, which has been seized, cannot be prize, and that the defendant, by his demurrer, has confessed this. But, though it be true that a demurrer does confess facts well alledged, I think that will not entitle the plaintiffs to a prohibition; for, if the common-law court has not a jurisdiction of the subject, no admission of parties can give it a jurisdiction. Besides, it is not confessed by the demurrer, that this ship did not belong to persons inhabiting within the territories or dominions of the King of Spain, for that is not alledged.

[608]

1781.

LE CAUX
against
EDEN.

“ed. Upon the whole, I am of opinion, that the court of common law had no authority to intermeddle in the suit, (wherein the question appears to be, whether the ship was prize or not,) and that the Admiralty has the sole jurisdiction; and if this inferior court of Admiralty have done wrong in refusing the plea offered, shall do wrong in any future determination, the proper remedy is by appeal.”

“The judgment of the court of law abroad, which was for the plaintiffs, was reversed [1].

[609]

“Then came the case of *Rous v. Haffard*, in 1779, which I have already stated, and which, as it was admitted on the first argument of this case, has been followed by nonsuits and determinations at *Guildhall*, which have never been objected to.

“And lastly, the case of *Vanderwoodst & others Thompson*, tried before Mr. Justice GOULD, on the 13th May 1780, at *Guildhall*, and afterwards brought before the court of *Common Pleas*; which was as follows:

“It was an action of trespass, against the defendant for breaking and entering the plaintiff’s ship, upon the high seas, and carrying away his money and goods. There was a second count, confining the trespass to goods only. The defendant pleaded “not guilty.”

“On the trial, it was proved, that the defendant had letters of *marque*, under which he attacked and boarded the ship of the plaintiffs, which made some resistance; that he found tea, gin, cannon, and small arms on board, and likewise some money, which was taken out of the ship, and carried away. That the defendant carried the ship to *Newcastle*, where the customs officers seized her for having smuggled goods on board, and that she was afterwards condemned in the *Exchequer*. The sentence of condemnation was read. It was contended, for the plaintiff, that the capture was unlawful, because the defendant did not belong to the customhouse; and he could not justify the seizure under the *hovering act* (a), as King’s ships only can force under such circumstances.

“But Mr. Justice GOULD held, that, as there was no reason to suppose that the ship was a pirate, though the jury should be satisfied she was not really so, yet the action would not lie.

[1] The course of the proceeding was this: *Pearse* having libelled in the Admiralty court at *New York*, and the plea of *Key & Hubbard* having been refused, they obtained, from the court of King’s Bench of that province, a writ of prohibition, and having declared in prohibition, and *Pearse* hav-

ing demurred, as above stated, the court over-ruled the demurrer, upon which *Pearse* brought a writ of error before the governor and council. They affirmed the judgment, and *Pearse* brought this appeal.

(a) 6 Geo. 1. c. 21. § 31.

1781.

LE CAUX
against
EDEN.

[610]

"In *Easter Term* last, there was a motion for a new trial, which, upon consideration, was denied by the court."

"Some of these cases go only to prove, that the court of Admiralty *has* a jurisdiction on the question of "*prize* or *not prize*," and its consequences, and, therefore, this court would not prohibit them from proceeding on such questions; and, that the Admiralty court has such a jurisdiction is not now denied, on the part of the plaintiff. But others of the cases shew, not only that the Admiralty *has* a jurisdiction, but that this court *has none*; and that, upon the general plea, of not guilty, no action can be maintained, where the question relates to prize.

"But, if there had been no such authorities, and the question had been now to be decided for the first time, there can be no case in which that maxim "*quod incon- veniens est non licitum est*," which is so often reiterated by Lord Coke, would deserve more attention.

"It is a very useful and a wise maxim, when applied to new or undecided points: and, in this case, the inconvenience would be intolerable, the convenience none, if such a motion were sustained.

"The inconvenience would be so great, that no officer would venture to seize a ship as prize; for he must do it at the peril of his utter ruin, since, if he were mistaken, he would be liable to an infinite number of actions, the costs of which alone, supposing the damages to be as universally as trivial as in the present case, no private man could discharge.

"The convenience would be none, because, by one suit in the Admiralty court, each individual is intitled to recover a full recompence for the injury he may have sustained.

"The plaintiff is not, (as was contended by his counsel,) at the mercy of the owner, for he might institute a suit himself, or he might make himself personally a party in the suit, commenced by the owner, or captor, and, in that suit, would be intitled to recover, not only for damage done to his cloaths or property, but for personal injuries to himself; some instances of which I have been favoured with from that court. And, in this case, the Admiralty have made allowance for the wages, provisions, and expences, of every man on board; which, for any thing that appears to the contrary on this record, is the measure of the real damages sustained.

"I agree with the counsel for the plaintiff, that, if it be clear upon principles, or judicial authorities, that an action may be maintained, the inconvenience will not prevail; the court must pronounce according to the law, as they find it, and parliament alone can relieve.

N 4

But

1781.

LE CAUX
against
EDEN.

[611]

‘ But no such principle, or authority, has been produced at the bar. The authorities are the other way, and so also, is the principle; for the principle is, that the question “*prize or not prize*,” and the consequences of it, are confusable solely in the Admiralty court; the true reason of which is, that prizes are acquisitions *jure belli*, and the *jure belli* is to be determined by the law of nations, and not by the particular municipal law of any country.

‘ The counsel for the plaintiff have endeavoured to distinguish the present case from the case of an action brought immediately after the seizure of the ship, because there has been a sentence of acquittal in the Admiralty court, which is conclusive, that the ship was not lawful prize.

‘ Of that I will take more particular notice presently, but I will first examine more minutely what is the ground of the decision, at the Cockpit, in *Rous v. Haffard*, as that may afford an answer to the objection made, that, at these events, the matter should have been *specialy pleaded*; which was an objection, that, for a long time, had great weight in my mind.

‘ The ground of the decision was, that the capture, of prize, was not a trespass at common law; for Lord Chief Justice LEE said, that, on *Not Guilty*, the plaintiff could not recover in *England*.

‘ But if, as insisted for the plaintiff, the capture had been, *prima facie*, a trespass at common law, it would have been incumbent on the defendant to have pleaded specially, that he seized the ship as prize, and what was the cause or ground, of seizure.

‘ This shews, that the courts have not a concurrent jurisdiction, for, if that were the case, the special matter must have been pleaded.

‘ The case before Mr. Justice GOULD was upon a plea of *Not Guilty*, and founded upon the same principle.

‘ It is true, that none of the cases which I have mentioned, were founded on *injuries to the person*, but were for damage done to the ship, or to the cargo, or goods on board. But *that*, I think, makes no difference, for the question must be the same in an action of false imprisonment, as it is in an action of trespass for taking away the goods, or the ship; and the party injured is much entitled to a satisfaction, in the one case, as in the other, in the Admiralty court. But, if there be any difference, that difference will operate in favour of the defendant, for a confinement under a capture is distinguishable from the common case of a false imprisonment.

‘ In the case of a capture, there is no distinct substantive act of imprisonment. It is only a necessary and unavoidable consequence of the capture. The captors do not mean to confine the captured longer than they are forced

1781.

LE CAUX
against
EDEN.

do so, for the purpose of securing their supposed prize. They cannot throw them all overboard, and they cannot sell the ship and cargo, without imposing some restraint on the men; but the moment they get to a shore, they are as willing to get rid of the men, as the men themselves can be.

It was admitted, on the first argument, That the question "*prize or not prize*," is a question solely and exclusively to be determined in the Admiralty court. But when it was contended, that, after a sentence in that court declaring the ship to be no prize, an action might be maintained.

But, in such actions as the present, the principal question must be, *prize or not prize*; for, if the ship be a lawful prize, it is not a false imprisonment; and that is a question which we cannot decide.

The question of "*prize or not prize*" must still arise, notwithstanding the acquittal in the Admiralty, though it be true that the sentence in that court is conclusive on the question. But it is evidence of a thing which this court cannot enquire into; and that is the ground of the decision in *Lev. 25.* for, though there had been a sentence of condemnation in that case, and the goods were afterwards on land, yet the court refused to grant a prohibition, *because the original cause, being of piracy, must all come in question again*, and they held that the sentence did not alter the case.

In the case in *Carth. 474.* and the later cases which I have mentioned in which there had been sentences of acquittal, the question of prize was as much at rest as it could be in the present case; but, notwithstanding that, the court have always said, that the subsequent matter was triable at common law, but altogether appropriated to the sole jurisdiction of the Admiralty. Besides this, if the original taking be not a trespass consuable at common law, the sentence of the Admiralty court cannot give a jurisdiction to his court, which it had not before.

That sentence does not alter the nature of the original taking. It was still a seizure as prize; which the common law does not take notice of, as a trespass; and the sentence cannot make that a trespass, which was not so at the time when the fact was committed.

Upon the whole, as the plaintiff has had, or may have, remedy elsewhere, as there is no such case in which it has been holden, that such an action can be maintained, it would be attended with great mischief and inconvenience if it could be maintained, and, as there are several authorities which say the action will not lie, I am of opinion that there must be judgment for the defendant.

Lord

[613]

1781.

LE CAUX
against
EDEN.

LORD MANSFIELD declared his assent to every thing
BULLER, *Justice*, had said.

Judgment for the defendant.

The two rules for new trials were afterwards discharged,
no writ of error having been brought in this case [1].

[1] The foundation and nature of the prize jurisdiction in the court of Admiralty having been explained by Lord Mansfield, in a very elaborate argument, when he delivered the opinion of the court in the case of *Lindo v. Rodney and Another*, and the subject being connected with this case of *Le Caux v. Eden*, I have inserted what his Lordship said on that occasion, in this place, tho' the decision was posterior, in point of time, to the period to which, for the present, I mean to confine these reports.

In *Michaelmas Term*, 22 Geo. 3. the rule to shew cause, why there should not be a prohibition, had been granted; and, in *Hilary Term*, 22 Geo. 3. (on Friday, the 25th, and Saturday the 26th of January,) the case was argued at the bar, by Dr. Wynne king's advocate, Dr. Scott, the Attorney General, and Dunning, against.—and Wilson, Wood, Pigott, Erskine, and S. Heywood, in support of, the application.

On Monday, the 4th of February, Lord Mansfield delivered the opinion of the court, as follows:

Lord Mansfield,—Many persons, in the same case, under the same circumstances, upon the same ground, have severally applied for a prohibition, to stop the Judge of the Admiralty from proceeding upon a *monition*, issued in the usual form, in order to the condemnation of goods, wares, merchandises, arms, stores, and ammunition, taken and seized, by his majesty's land and sea forces under the command of Admiral Rodney and General Vaughan, at the island of St. Eustatius, and its dependencies, upon the surrender of the said island of St. Eustatius, and its dependencies, on or about the 3d of February last; and citing all persons to shew cause, why they should not be pronounced to have belonged, at the time of the capture and seizure, to our enemies, and as goods of enemies, or otherwise liable to confiscation, be adjudged, and condemned, as good and lawful prize.

'Elias Lindo claims part of these goods, as belonging to him, a British subject, and, as to them, prays a prohibition; and, by his suggestion, among other things, he avers;

'That Sir George Rodney and General Vaughan, upon the 3d of February, in a hostile manner, seized upon, and took possession of, the island of St. Eustatius, with every thing whatsoever therein being, (open hostilities then subsisting between the king and the States,) and that the goods claimed were taken upon land, in the said island of St. Eustatius.

'The ground upon which the prohibition is prayed, is; that the goods were taken upon land, which appears upon the face of the motion, and is averred by the suggestion.

'The only question then is, Whether the goods being taken on land, though in consequence of a surrender to ships at sea, excludes the only prize jurisdiction known in this kingdom?

'This question naturally leads to an enquiry into the nature of this jurisdiction, exercised by the Judge of the Admiralty exclusively of every other jurisdiction of every kind, except upon appeal.

'Upon the motion being made, I directed, in court, a search to be made into the books of the Admiralty, especially during the reign of Queen Elizabeth: I also got a search made myself. And one of the Registers informed us, in court, during the argument, that there are no prize-act books farther back than 1673; no sentences further back than 1648.

'The Register has not been able to search farther back than 1699. The prior records are in confusion, illegible; and no index.

It appears that this jurisdiction in matters of prize, (whether it be coeval with the court of Admiralty, or, which is much more probable, of a later institution, beyond the time of memory,) though exercised by the same person, is quite distinct. He

He is appointed Judge of the Admiralty by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction; but not a word of prize.

To constitute that authority, or to call it forth, in every war, a commission under the great seal issues to the Lord High Admiral, to will and require the court of Admiralty, and the Lieutenant and Judge of the said court, his Surrogate or Surrogates, and they are thereby authorized and required, to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations.

A warrant issues to the Judge accordingly.

The monition and other proceedings are in his name, with all his titles of office, rank, and degree; adding, emphatically, as the authority under which he acts, the following words; "And also to hear and determine all and all manner of causes, and complaints, as to ships and goods seized and taken as prize, specially constituted and appointed"

The court of Admiralty is called the *Instance* court; the other the *Prize* court.

The manner of proceeding is totally different.

The whole system of litigation and jurisprudence in the prize court, is peculiar to itself: It is no more like the court of Admiralty, than it is to any court in *Westminster Hall*.

From 8 *Eliz.* c. 5. it appears, that in civil and marine causes, there were many appeals, which the statute restrains to one to the king in Chancery, to be finally decided by delegates. But prize is not a civil and marine cause; and the appeal lies to commissioners, consisting of the Privy Council.

A thing being done upon the high sea don't exclude the jurisdiction of the courts of common law. For seizing, stopping, or taking a ship, upon the high sea *not as prize*, an action will lie; but for taking *as prize*, no action

will lie. The nature of the question excludes; not the locality. This was explained in the case of *Le Caux v. Eden*. 1781.

The end of a prize court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, *velis levatis*, (as the books express it, and as I have often heard Dr. Paul quote,) if upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against every body, giving every body a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay.

These views cannot be answered in any court of *Westminster Hall*, and, therefore, the courts of *Westminster Hall* never have attempted to take cognizance of the question, "*prize or no prize*;" not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject.

As to plunder, or booty, in a mere continental land war, without the presence or intervention of any ships, or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot; or wrongfully taken by them, contrary to military discipline. If there is any dispute, it is regulated by the commander in chief. There is no instance, in history, or law, ancient or modern, of any question before any legal judicature, ever having existed about it, in this kingdom. To contend that such plunder was within the rules and jurisdiction of the prize court, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge. Therefore, the counsel have confined their argument to reprisals ashore, by a naval force: at least, I shall consider it as so confined, without entering into any question about booty, in a mere land

1781.

LE CAUX
against
EDEN.

land war; as to which I have no light to go by, and it is not now necessary to be decided. *Neque teneo, neque dicta refello.*

‘The question then is, whether such a capture ashore, by a fleet of ships, and the land and sea forces aboard, in consequence of a previous surrender of the place, is within the jurisdiction of the court of prize.

‘Two general objections have been relied upon.

[615] ‘1. That, though it were given and immemorially exercised, yet it cannot subsist, because contrary to the statutes of 13 and 15 Ric. 2. and 2 Hen. 4.

‘2. If there is no objection from these statutes to the existence of such a jurisdiction, that it is not given by immemorial usage, or the true construction of the commission.

‘As to the first, These statutes manifestly relate to the usurpations of the *Instance court* of Admiralty, in causes civil and marine, to contracts, pleas, and quarrels, only triable at law. There is not a word in any of the statutes applicable to the *Prize court*; there was no complaint of it; not a syllable of commissions to judge of prize.

‘In the subsequent altercations, in the reign of James I. between the Admiralty and the Judges, there is not a word of prize: The Admiralty don’t complain of prohibitions in prize; none had ever been granted: The Judges don’t complain of encroachments in matter of prize.

‘The view, purport, and tendency of the statutes, is to prevent the Admiralty from trying matters triable at law. The taking a ship upon the high sea is triable at law to repair the plaintiff in damages: but a taking on the high sea as prize is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—prize or no prize—not only authorizes the prize court, but excludes the common law.

‘These statutes don’t exclude the common law in any case, and they confine the Admiralty by the locality

of the thing done which is the cause of action: It must be done upon the high sea.

‘If done in ports, havens, or rivers, within the body of a county of the realm, the Admiralty is excluded. But the prize court has uniformly, without objection, tried all captures in ports, havens, &c. within the realm. It happens often. We all remember several cases. Ships, not knowing of hostilities, come in by mistake. Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made. They can only be condemned in the court of prize.

‘What is still more extensive, foreign ports, or harbours, are not the high sea, any more than the shore, but numberless captures made there, have been condemned as prize.

‘I am of opinion that these statutes have no view or relation to the subject of prize: consequently there arises from them no objection.

‘2. The second objection is, that the jurisdiction is not given.

‘I will consider this objection in three points of view.

‘1. Upon the words of the commission.

‘2. Upon the reason of the thing.

‘3. Upon authorities and usage.

‘1. As to the first; the commission certainly has in view captures by ships. Hostilities are committed by ships and the men aboard, at sea, or ashore; a fight begins; the vanquished runs ashore; gets the goods out; is pursued ashore; and the goods are taken.

‘A fort or town is taken by the force of ships at sea, and is ransomed; or plate, money, and valuable effects taken

‘The means this country has of annoying, and making reprisals upon an enemy, is by naval expeditions. There never was, there never will be, one, no not a single ship, which has not a view to operations upon land, if occasion should offer. They are often the main view—Sir George Rooke at Vigo—Admiral Vernon at Porto Bello and Carthagena—Lord Anson in the South Seas—Sir George Pocock at the Havana—

Havannah—Many last war to *Martinnico*, *Guadaloupe*, and other places—Commodore *Johnston* the other day.

‘In many old treaties, some of which I shall mention by and by, the usual stipulation is, that the subjects of the one prince shall do no injury or violence to the subjects of the other, by land or sea, or in fresh waters, or in port. It is not by accident, therefore, that the words of the commission are general—All manner of captures, seizures, prizes, and reprisals of all ships and goods.—It don’t say, upon the sea—It don’t say—goods in the ship.—“*Reprisals*,” is the most general word that can be used.

‘In cases *civil and marine*, to give jurisdiction to the court of Admiralty, the libel must allege the cause of suit to be done upon the high sea, and therefore, if that had been the intention of the commission, or the rule of law, it would certainly have been so expressed in the commission.

‘2. The reason of the [616] thing requires the words should be general.

‘It is, as I have said, in the view of every ship, much more of every fleet, which fails to make reprisals, to act on shore. There is no place of note which can be attacked, where neutral or *British* subjects do not reside, or have property, or where the enemy may not colourably borrow their names.

‘If it is not within the jurisdiction of the prize court, consider the consequence to the captors; to the claimants; and to the state.

‘The captors are in a miserable condition indeed. The prize cannot be condemned. If granted, it cannot be shared. Every officer and sailor may be liable to actions without number. The taking cannot be disputed. To disprove the property, they can only have witnesses from abroad, who cannot be compelled to come. The grounds upon which the prize court condemns or acquits, cannot be read at law; and in every action where the plaintiff recovers to the value of a farthing, the captor must pay the costs.

‘Colourable claimants might easily ruin the captors, through their want of the means of defence.

‘It would be equally mischievous to fair claimants. They could not have their property restored instantly, upon their own papers, books, and *affidavits*. They must make formal proof. And the owners or crew of a privateer all the while might be spending the effects.

‘But to the state the consequences would be still more mischievous.

‘No distinction can be made between *British* and neutrals. If the jurisdiction is null by the statutes, or never was given, it can no more be exercised in the case of a neutral, than in the case of a subject.

‘By the law of nations, and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in these courts of the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captors for damages, and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation of which he is totally ignorant, and subjects his property to the rules and authority of a municipal law by which he is not bound.

‘In short, every reason which created a prize court as to things taken upon the high seas, holdsequal when they are thus taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea.

‘Mr. *Pigott* candidly said, it would be spinning very nicely, to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea capture. I agree with him, but I cannot distinguish that case from this. Both takings are literally upon land. In both, the

1781.

LE CAUX
against
EDEN.

1781.
 LE CAUX
 against
 EDEN.

the prey is, as it were, killed at sea, and taken upon land. Here the capture of the goods on land is the immediate consequence of the surrender at discretion to a sea force.

‘Would a sum paid by capitulation upon land have made it a sea or a land prize?’

‘*Cui bono* should all this subtilty be spun, when the reason for a jurisdiction to judge a capture at sea and such a capture at land is exactly the same?’

‘3. Authorities and immemorial usage.’

‘In 1498, a treaty intituled *Confirmatio Tractatus contra spolia maritima, et pro depredatoribus coercendis*, between Henry VII. and Louis XII. confirming one before made with Charles VIII. (13 Hen. VII. Rymer, vol. 12. p. 690.); and, in 1526, another between Henry VIII. and Francis I. (17 Hen. VIII. Rymer, vol. 14. p. 147.)

‘They stipulate, that, (before any ship goes out of port,) the Admiral, &c. shall take sufficient security from the owners, that the master and mariners shall keep the peace towards the subjects of the other prince; and shall do them no injury or violence by land or sea, or in fresh waters, or in any port. The mariners to take an oath, that, when they return with their ships, and spoils, if they take any, they will immediately inform the Admiral, or his officers, of the port from which they sailed, of their plunder, (*præda*) spoils, and goods, without whose decree and permission they shall not be suffered to convey them out of their ships, or to exchange, sell, or aliene them. No body to purchase, &c. from them, before the Admiral, &c. have declared them to be lawful prize

and capture; but, if it shall [617] be found that the said plunder, (*præda*), was taken away from the subjects, lands, kingdoms, or dominions, of either of the said kings, the goods taken, with damages and interest, shall, without delay, be ordered to be restored to the persons who have been plundered, and

the sentence to be against masters, partners, owners, and sureties.

‘Either party aggrieved may appeal to the supreme council.’

‘These treaties demonstrate the jurisdiction of prize in the Admiralty and commissioners of appeal then, to have been pretty much as it is now. Ships of war are to give security to do no injury or violence by land or sea, or in fresh waters, or in any port. When they return with prize, they are to disclose it, if they have taken any thing *by sea or land* from the subjects of either prince. If they have taken from the subjects, *lands*, kingdoms, or dominions, of either, instant restitution to be made with costs and damages. If taken from the *subject*, in the land of an enemy, to be restored. If taken from the *land* of either prince, though the goods of an enemy, to be restored: it is a breach and violation of his territory. A capture of Admiral *Boscawen* upon the land and shore of the King of Portugal occasioned much discussion.

‘It manifestly appears from these treaties, that the jurisdiction equally extended to goods taken by ships or their crews on land and at sea. They shew too, that no property vests in any goods taken at sea or on land, by a ship or her crew, till a sentence of condemnation as good and lawful prize; which continues law to this day.

‘In *Goss v. Withers*, 2 Burr. 694. it is said, “That I had talked with Sir George Lee, who had examined the books of the court of Admiralty, and informed me, that they held the property not changed so as to bar the owner, in favour of a vendee, or recaptor, till there had been a sentence of condemnation, and that, in the reign of Charles II. Sir Richard Floyd, (the father of the late Sir Nathaniel,) gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer, after she had been 14 weeks in the enemy’s possession, because she had not been condemned. That another case, upon the same principle, against a vendee, is cited at the end of *Affrevedo v. Cambridge*, in 1695, (*Lucas* 79.) after a long

long possession, two sales, and several voyages."

"In the reign of Queen *Elizabeth*, it is well known that a buccaneering war was carried on by private adventurers, and that, in the *Spanish West Indies*, considerable prize was taken at land.

"Dr. *Wynne* said, the commissions to fit out ships against the enemy expressly authorize the persons to whom they are granted to take the enemy's goods by land as well as by sea.

"He cited one by way of instance, in the 37th of *Elizabeth* 1595, (*Rymer*, vol. 16. p. 2751.) A commission to *Robert Croffe*, giving full power, in hostile manner, *as well by land as sea*, to invade, take, stay, and destroy, any ships or goods of the King of *Spain*, his subjects, or adherents.

"And such ships, goods, jewels, bullion, or any other riches, as they shall take in them, we do strictly charge and command you to see that they be safely preserved from spoil, and to be brought home in good order into the realm of *England*."

"They were to seize goods by land and sea. All they seized they were to bring to *England*. No property vested till condemnation. They could only be condemned by the prize court of Admiralty. They therefore most certainly were so condemned, though the proceedings are lost.

"In the reign of Queen *Elizabeth*, and former reigns, many special commissions issued, to inquire into depredations by violators of treaties, and the law of nations, which are to be seen in *Rymer*. But the most ancient instrument shews a prize jurisdiction, either inherent, or by commission, in the Admiral. It is a letter from *Edward III.* to the King of *Portugal*, (*Rymer*, vol. 6. p. 15.) and recites a complaint, that the Admiral, before whom the goods were judicially demanded, determined, that they should not be restored, as having been taken in war.

"Since the reign of Queen *Elizabeth* no special commission appears to have issued; but the judge of the Admiralty, either by virtue of an inhe-

rent power, or the King's commission, or both, has solely exercised the jurisdiction of prize.

"I will conclude with three propositions.

"That, so far back as particular cases can be traced, which is for a century, the Admiralty has judged of, and condemned, [618] goods taken on land as prize, as well as goods taken on sea.

"2. That every common-law authority to be found on the subject, allows and supports the jurisdiction.

"3. That the legislature has, in many acts of parliament, recognized and referred to it, as clear, certain, and undoubted.

"1. 15 April 1692. The sentence of Sir *Charles Hedges*, Judge of the Admiralty prize court, on goods taken on the plunder of a town.

"Captain *Mann*, commander of their Majesty's hired ships in the *West Indies*, goes on shore with several of his crew, and pillages and plunders the inhabitants of a town, then in the territories and dominions of the *French King*, and brings off, and carries on board his ship, a considerable quantity of goods, to the amount of 20,000*l.* as is sworn by several witnesses, besides 30 negroes, worth 20*l.* each. This pillage he keeps to himself, without making any distribution thereof to his followers, or crew. The mariners, thinking they had a right to a share thereof, have called him to an account in the court of prize, and the questions which are made, are:

"1. Whether this court has jurisdiction?

"2. Whether the mariners have a right to a share?

"3. What that share shall be?

"1. As to the jurisdiction; which is twofold, the court of Admiralty, and the court of prize.

"Here there is a long argument to shew that it may belong to the court of Admiralty, as incident to the military authority of the Admiral, in time

1781.

LE CAUX
against
EDEN.

of

1781. of war, upon descents, as well as at sea,—which is not material to be now stated.—He proceeds thus :)

“ But go to the second ground of jurisdiction in this case, that it is, (as it is,) before the court of prize, where, by the plain words of the patent under the broad seal of England, it is evident enough, that the court has cognizance of prize goods taken from the French, as well by land as by sea. It is, therefore, very clear to me, that this court has jurisdiction.”

“ He then proceeds upon the other two questions, as to the shares, but that is not material.

“ This was followed, very soon after, by the cause which gave rise to the motion for a prohibition in 1698 (a).

“ 1703. *Vigo*. Captures under different circumstances. Many to this purport.

“ *Adventure. Trevor*, Captain. The Queen against the goods in a certain schedule annexed, taken from the enemy, at the port of St. Mary and St. *Vigo*, in the kingdom of Spain, and put on board the said ship, and there, or in the hands of the said *Trevor*, now, or lately, remaining, and against all persons in general.

“ Much was undoubtedly taken on land, and all condemned.

“ 10 June 1745. *Peyta*. Sentence of condemnation to the King. Several purses of money, and jewels, amounting to 30,000*l.* and upwards, taken and seized as plunder, in the town of *Peyta*, being a town in the Spanish West Indies, in the kingdom of Spain, from the enemies of the Crown of Great Britain, were rightly and duly taken by the officers and mariners of his Majesty's ships, (naming them, &c.)

“ 4 Feb. 1746. Plunder taken from the island of St. *Bartholomew*, and condemned in *Antigua*, viz. 170 negro and mulatto slaves, and divers

other goods, wares, and merchandizes, seized and taken from the island of St. *Bartholomew*.

“ 27 April 1759. *Savannah*. Taken by Sir *Hyde Parker*'s fleet. Goods and effects, (specified,) taken in boats and craft, and on shore. Many claims and restitutions.

“ 27 June 1759. Plunder taken at *Senegal*.

“ 28 March 1763. *Havannah*. Upon another state of facts. The ship *Tyger*, and the effects on board, surrendered by capitulation, with the town ;—a treaty on land.

“ These cases shew, that, for a hundred years, the jurisdiction has been professedly, notoriously, and quietly exercised ; which leads to the second proposition, that this exercise does not rest on acquiescence only, but

“ 2. That every common-law authority to be found on the subject, allows and supports the jurisdiction.

“ *Brown & Burton v. Franklyn*, the King's Proctor, *Scacc. H. 10 W. 3. Carth. 474*. *Brown & Burton*, the masters of two ships belonging to the East India Company, took a French ship, and cargo, and money, upon land. They had no letters of marque. The King's proctor, upon the usual monition, got a sentence [619] of condemnation of the whole, as perquisite of Admiralty, and then proceeded upon the ground of this sentence, against *Brown & Burton* for an account.

“ They moved for a prohibition, suggesting the statutes of 13 and 15 Ric. 2. and 2 Hen. 4. and averring that the goods and merchandizes were taken upon land, in the East Indies, and that they were no parties to the sentence, never heard, and ought not to be bound.

“ The last was an objection upon the eternal principles of natural justice, but immediately removed, when the nature of the proceeding in rem came to be explained.

“ The ground which remained, was their being taken upon land. If the court had no jurisdiction, the sentence

was

(a) *Brown v. Franklyn*.

was null and void, the subsequent proceeding was illegal, and must have been prohibited.

‘But it was insisted, by the counsel against the prohibition, that *prize or no prize* was a matter not triable at common law, but altogether appropriated to the jurisdiction of the Admiralty.

‘The court concurred in this proposition, and, therefore, denied the prohibition.

‘This is a judgment in point, and the attempts which have been made shew, that no ingenuity can distinguish it, and Lord Chief Baron Comyn draws a general conclusion and maxim of law from it:—“If a sentence be “in the Admiralty, for a ship or “goods, as prize, a prohibition does “not go upon a suggestion, that it was “not prize, or that it was acquired upon land (a).”

‘But, in 1742, there is a more solemn and more elaborate judgment, by Lord Chief Justice Lee, a very able and a very strict common lawyer; viz. in *Key & Hubbard v. Vincent Pearse*, 31 January 1742. I was counsel in it. It was argued, and could only be argued, as a mere question of law, just as if it had arisen in *Westminster Hall*, upon a capture in the river *Thames*, within the body of a county.

‘The colonies take all the common and statute law of *England*, applicable to their situation and condition. The courts of law prohibit the court of Admiralty, just as the courts of *Westminster Hall* do here.

‘I had a full note of it. But, luckily, Lord Chief Justice Lee having taken time to consider, he brought with him notes of the opinion he was to deliver, which notes we have in his own hand. I have also the report of the committee, and the order of counsel upon it.

‘I will state to you the notes from which the Chief Justice gave his opinion, in his own hand.’

(Here his Lordship read the opinion of Lee, Chief Justice, *verbatim*, as it is set forth *supra*, p. 606. to 608.)

1781.

LE CAUX
against
EDEN.

‘Nothing can be clearer than the principles laid down by him. The question, “*prize or no prize*,” is the boundary line; and not the locality of land or sea, or port within the body of a county within the realm.

‘3. That the legislature, in several acts of parliament, has recognized and referred to this jurisdiction over goods taken on land as prize.

‘The prize acts of the 17th (b) and 29th (c) of George II. contain a clause, that the Lords of the Admiralty shall grant a commission, at the request of the owner, to the captain of any ship, “for attacking or taking “with such ship, or with the crew “thereof, any place or fortress upon “the land, or any ship or goods belonging to, or possessed by, &c.”

‘The statute of the 10th of George III. (d), meaning to express the same thing, has used more words to effectuate the grant of the property to privateers, but takes the jurisdiction for clear and certain.

‘Subsequent acts follow this.

‘Upon these authorities there can be no doubt. We, none of us, ever had any.

‘If the question had been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants, and the state, if goods taken upon land by ships, should not be within the prize jurisdiction.

‘The merits are no part of this question. If the captors have done wrong, in substance or in manner, the Judge of the Admiralty, and, if he err, the Lords of Appeal, have full power to make ample reparation. They give

(a) *Com. Dig.* Title *Admiralty*. (E. 9.)

(b) 17 Geo. 2. c. 34. § 2.

VOL. II.

(c) 29 Geo. 2. c. 34. § 2.

(d) 19 Geo. 3. c. 67. § 2.

1781. **LE CAUX** give satisfaction even to an enemy prisoner, who is illiberally plundered, or personally ill treated.

Against **EDEN.** 'As we are all clearly of the opinion I deliver, we ought not to contribute to the injustice and mischief which may be occasioned to many persons, from the delay which would arise, from giving liberty to declare in prohibition, and the parties know, they are not finally barred by our judgment. They may apply for a prohibition to every court in *Westminster Hall*.

'Therefore, we are all of opinion, that the rule should be discharged.'

No motion has been made for a prohibition, in any other court; but an action, (*viz. Mitchell and another v. Rodney and another*), in which the same question arises, was tried before Lord Mansfield, at the Sittings after Hilary Term, 22 Geo. 3. and a special verdict found, upon which judgment passed in B. R. for the defendants, in the ensuing term, without argument, the opinion of the court being already known; and a writ of error upon that judgment is now depending in the House of Lords [† 126]

[† 126] On the 24th of November 1783, the judgment of the court below was affirmed.

Friday,
9th February.

LUXTON against ROBINSON.

In an action upon an agreement to deliver possession for certain considerations subject to a forfeiture on failure by either party, the person who was to deliver possession cannot sue for the forfeiture, without shewing in his declaration a possessory title in himself.

ASSUMPSIT, on an agreement, by which the defendant was to take, of the plaintiff, certain premises known by the name, &c. and the goods and fixtures which should appear to be the property of the plaintiff, by a fair appraisement, by two appraisers, or their umpire, or else to forfeit a deposit of five guineas, and, if either should fail in his part of the agreement, that he should pay 10*l.* to the other, exclusive of the deposit; the defendant to take possession on a day specified. The plaintiff averred, that, on the day, he was ready and willing to deliver to the defendant the said premises, and such goods and fixtures as should appear to be the property of the plaintiff, at such appraisement as in the said agreement mentioned, yet the defendant did not then, nor at any other time, accept and take of the plaintiff, the said premises, but wholly refused so to do, by reason whereof he became liable to pay the said sum of 10*l.* exclusive of the deposit. *Special Demurrer*; for that it does not appear; 1. That the plaintiff had any interest in the said premises, at the time of making the agreement; nor, 2. That he ever requested the defendant to take the said premises, and such of the said goods, &c.; nor, 3. That the said goods and fixtures were ever appraised in any manner whatsoever.

In support of the declaration, it was said, that, when a party declares on a demise, there is no occasion to shew an interest; if the defendant means to call that in question, he ought to plead *nil habuit in tenementis*, and then the

the plaintiff must shew a title, in his replication. Besides, in this case, it was not necessary that the plaintiff should have an interest in the premises, for nothing was to be paid but for the goods and fixtures. As to the appraisement, it was enough to aver, that he was ready and willing. He could not have an actual appraisement without the concurrence of the defendant; for, from the nature of the contract, one appraiser must have been named by each.

Wood, for the plaintiff.—*Runninton*, for the defendant.

BULLER, Justice.—This is not like a demise by deed. Here, the plaintiff was to *deliver possession*, and, therefore, he ought to have shewn, that he had a right so to do. With regard to the appraisement, if each was to appoint one, he should have shewn, that he had appointed one.

Wood had leave to amend, on payment of costs.

1781.

LUXTON
against
ROBINSON.

The KING *against* the INHABITANTS of
CORHAMPTON.

Saturday,
10th Feb.

THE court of Quarter Sessions for the county of *Surry*, confirmed an order of two justices, for removing the wife and children of one *Richard Goodiff*, from the parish of *Croydon*, to the parish of *Corhampton*, subject to the opinion of this court, on the following facts:

Richard Goodiff was originally settled at *Corhampton*. In 1769 he came to *Croydon*, and there rented a house at 4*l.* 10*s.* *per annum*. On the 10th of *June* 1773, the overseers of the poor of *Croydon* made a rate of 2*s.* in the pound, in this form, *viz.*

When the title of the rate is—
So much in the pound,—
and the pauper's name is inserted in the rate, and also his yearly rent, though nothing is written against his name in the column of *Sums assessed*, this is a sufficient rating for the purpose of gaining a settlement.

Rent.		Occupiers' Names	Sums Assessed.
£ 10.		A. B.	£ 1.
4.	2 C.	<i>Richard Goodiff.</i>	

On the 22d of *June*, one of the overseers demanded of *Goodiff* 8*s.* for the rate, declaring he was assessed in that sum for the relief of the poor. *Goodiff* objected, alleging he was not a parishioner. The overseer opened the rate-book, and shewed him his name therein, and threatened to distrain for the 8*s.* if he did not pay it. *Goodiff*, on this, paid the money directly. In the after-

[622]

1781.

The KING
against
CORHAMPTON.

noon of the same day, the overseer returned, with the vestry clerk, and offered to return the money, saying he had taken it by mistake. *Goodiff* refused to receive it. The overseer however left it, and went away, on which *Goodiff* threw the money after him.

It was admitted, that *Q. C.* meant *Square Certificate*.

Mingay, in support of the order, said, he admitted, that in all the cases where the question had turned upon the way in which the person meant to be rated was described, the court had inclined to a favourable construction, but that, here, there was no rating. There was no sum put against *Goodiff's* name. The parish knew he occupied the house, but they never intended to rate him. The mistake of the overseer, (and corrected so soon,) in supposing him rated when he was not, could not be binding on the parish. He cited *Rex v. Warblington (a)*.

Kirby, Serjeant, and *Palmer*, on the other side, insisted, that the omission of a particular sum in the column of "*Sums assessed*," was supplied by the style of the rate, being a rate of 2*s.* in the pound, coupled with the entry of 4*l.* opposite to *Goodiff's* name, in the column of *Rent*. The case of *Rex v. Warblington* was very different in its circumstances from this, and went upon fraud committed by the pauper.

Lord MANSFIELD, (stopping *Palmer*,)—The case cited does not apply. The payment, there, was not till a year after it should have been made, and the overseer was induced to receive it by a misrepresentation. There is no question here. The title of the rate is "*Two shillings in the pound*," and, in the column of *Rent*, *Goodiff's* rent is 4*l.* This fixes his proportion of the rate. For what purpose was his name inserted, if not to rate him? Then, has he paid? Yes; and against his will; and the overseer shall not have it in his power to say, upon reconsidering the matter, "I have thought better of it, and you shall not gain a settlement."

Both the orders quashed [† 127].

(a) *T. 14 Geo. 3. Burr. Settl. Ca.*
N. 245.

[† 127] Vide *Rex v. Heckmondwicke*, *supra*, p. 564. and the cases there cited, *note* [† 65].

[623]

Monday,
12th Feb.

YATES against FRECKLETON.

Payment of the debt, to an agent employed to sue the defendant by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney himself is.

ACTION on a note of hand. The plaintiff's attorney in town had sent the note to *Fox*, an attorney at Coventry, where the defendant resided, to present it for payment; and, by the letter inclosing it, directed him, if

payment

payment to the attorney himself is.

payment should be refused, to return it immediately to him; adding, that, in the event, he would send down a writ to him, to arrest the defendant. *Fox* having accordingly presented the note, and payment being refused, he wrote to the attorney in town, to inform him of it, and a writ was sent to him, upon which he arrested the defendant, who gave bail to the sheriff. *Fox*, afterwards, got an assignment of the bail-bond, to the plaintiff, and some time afterwards, the defendant paid the debt, and all the costs then incurred, to *Fox*, who gave him a receipt. After this, the bail were served with process and notice of declarations on the bail-bond, *Fox* not having paid the money over to the plaintiff, or his attorney, and the attorney having employed another agent, but without giving any notice of the change to the defendant. The letter to *Fox*, accompanying the note, had not been shewn to the defendant, before he paid the money; but, when the process on the bail-bond had been served by the new agent, *Fox* produced it to the defendant, to convince him that he was duly authorized to receive the money.

On *Thursday*, the 1st of *February*, *Douglas* obtained a rule for the plaintiff to shew cause, why the proceedings on the bail-bond, subsequent to the payment of the debt and costs by the defendant, should not be set aside, with costs; and all further proceedings in the mean time staid. On *Saturday*, the 10th of *February*, this rule was enlarged, with the addition, that *Fox*, on notice to be given him of the rule, should answer the several matters in the *affidavits*.

It was then, and this day, urged, in support of the rule, that payment to an agent is the same thing as payment to the original attorney; and that the plaintiff's attorney ought not to have changed his agent, without giving notice to the defendant. That, besides, the letter, here, was to be considered as a special authority to receive the money, and, although it had not been shewn to the defendant before the payment, yet the plaintiff, who had thereby, (through his attorney,) vested the power in *Fox*, ought not to be suffered to avail himself of that circumstance.

Dunning, for the plaintiff.—*Caldecot*, for *Fox*.

The court were clear, that an agent employed to sue, is not, therefore, authorised to receive payment [17]. They said, it had been formerly doubted, whether payment to the attorney was payment to the party, though it was now settled

1781.

YATES
against
FRECKLE-
TON.

[624]

[17] But if the agent in town, take money out of court, which the defendant has paid in under a Judge's order, but irregularly, that shall bind the plaintiff, and be a waiver of the irregularity. *Griffiths v. Williams*, B. R. E. 27 Geo. 3. 1 Term Rep. 710.

1781.

YATES
against
FRECKLE-
TON.

settled to be so [1]. That the letter, so far from importing an authority to receive the money, implied the reverse, in case the note should not be paid voluntarily, because, in that event, *Fox* was to return it. If it had been meant, that he should also, in that case, receive the money, the note would have been left in his custody.

Fox having made no exculpatory *affidavit*, an absolute rule was made, that, upon payment by the defendant, of the debt and costs, (the costs of this application excepted,) to the plaintiff, all further proceedings should be staid; and that *Fox* should pay the debt and costs to the defendant, and also the plaintiff's costs of this application to him, on or before the 1st of *March*, otherwise an attachment to issue against him.

[1] Vide *Powel v. Little*, B. R. H. 20 Geo. 2. 1 *Blackst.* 8.

Monday,
12th Feb.

BRADBURY against WRIGHT.

On a grant of a fee-farm rent, "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee is intitled to receive the full rent without deducting the land-tax.—Distress is not incident to a fee-farm rent as such, except the case is brought within the statute of 4 Geo. 2. c. 28, § 5.

*[625]

ACTION of *replevin*. The defendant makes confession as the bailiff of one *Wilkinson*, and then states;—That *Eyre* and *Bretland* were seised in fee of the *locus in quo*, and that they, by indenture, dated the 20th of *April* 1693, bargained and sold, aliened, released, and confirmed, the same, to *Jordan Bradbury*, his heirs and assigns, in fee farm, for ever, yielding and paying, yearly, to *Bretland*, his heirs and assigns for ever, by half-yearly payments, at a place and on the times mentioned, the yearly rent of 4*l.* 17*s.* 6*d.* "without any deduction, defalcation or abatement for or in any respect whatsoever;" That seisin was delivered to him accordingly, and, by virtue of the said premises, *Jordan Bradbury* became and was seised in fee of the *locus in quo*, and *Bretland* became and was seised in fee of the fee-farm rent of 4*l.* 17*s.* 6*d.* by the said indenture of *seoffment* so reserved and made payable to him, his heirs and assigns: Then deduces a * title to the said fee-farm rent to *Wilkinson*, and alledges, that 2*l.* 8*s.* 9*d.* of the said fee-farm rent for one half year was in arrear, and that the goods were taken as a distress for the same.—*Plea in bar*, as to 2*s.* 1½*d.* part of the said 2*l.* 8*s.* 9*d.* that, by the land-tax act of 1778, 17*s.* 4*d.* was assessed on the *locus in quo*, that a like rate for the said fee-farm rent would, by a just proportion, amount to the said 2*s.* 1½*d.*; wherefore the plaintiff, according to the form of the said statute [1], did abate, deduct, and keep in his hands, the said 2*s.* 1½*d.*; and, as to the residue, he pleaded a tender and refusal, prior to the time when, &c. and that, after the tender, and before the said distress was so made and taken as aforesaid, no request or demand was made of the said residue.—*General Demurrer*.

The

[1] Vide 4 *W. & M. c.* 1. § 6. Copied in all the subsequent land-tax acts.

The question argued by the counsel, upon this record, was, Whether, by virtue of the words, "*without any deduction, defalcation, or abatement for or in any respect whatsoever,*" the grantee of the rent was intitled to receive the whole, discharged of the land-tax? *Davenport* argued for the plaintiff, and *Chambre* for the defendant.

1781.

BRADBURY
against
WRIGHT.

For the plaintiff, *Brewster v. Kitchen* (a), and a case of *Champernon v. Champernon*, before the present Lord Chancellor (b) were cited. In the first, upon a covenant to pay a rent-charge, *without deduction of any taxes for the said rent*, it was held, by Lord Holt, and the whole court, that the rent was to be paid in full, without deducting the land-tax imposed by 4 & 5 Will. & Mar. This case was stated to be in point, and one of the reasons given by Lord Holt for his opinion in that case seemed, it was said, *a fortiori*, applicable to the present; for the rent, there, was granted in 1649, and, although the present form of the land-tax, and which was established before the question arose, had not then been introduced, yet, (because taxes of *that nature*, viz. the monthly assessments, had obtained before that time, and there was, in the acts of the Commonwealth, the same clause as in the then and present land-tax acts, for the tenants to deduct the tax out of their rent [2],) he thought, that the words of exemption must have been meant to comprehend such taxes if imposed in future, and to exempt the grantee from the burthen of them. As to the present case, the land-tax had been established in its present form just the year before the date of the deed on which the question arises, and, therefore, must have been in the contemplation of the parties. In *Champernon v. Champernon*, the question was upon the construction of a power to make jointures *free from taxes*, and the Lord Chancellor held, that the land-tax was particularly within the words of the power, as being the only tax to which land is absolutely liable.

[626]

Chambre insisted, that neither of those two cases applied, because, in both, the word "*taxes*" was expressly used. So, in *Hoopwood v. Barefoot*, where the tenant was also held liable to the land-tax, the words were still stronger, "And all sums that now are or shall be *assessed or taxed* for and in respect of the premises, for chimney money, church and poor, *or otherwise* (c)." He said, the question was, whether the defendant was intitled to the exemption, notwithstanding the clause in the land-tax acts, by which landlords, owners, and proprietors of

lands,

(a) *B. R. H. 9 W. 3. 1 Ld. Raym.*
137. *S. C. 1 Salk. 198. Carth. 438.*

(b) 1780.

[2] 4 *W. & M. c. 1. § 13. Co-*

pied in the subsequent acts. *Qu.* If the clause referred to in the plea (viz. § 6.) was in the acts of the Commonwealth.

(c) *B. R. T. 8 Ann. 11 Mod. 238.*

1781.
BRADBURY
against
WRIGHT.

lands, are authorized to abate and deduct a proportionable part of every *fee-farm rent* or other annual rent payable out of their lands, of the rate *taxed or assessed* on them (a). To intitle him to such exemption, the words *taxes or assessments* ought to have been used. The statute provides, by another clause, "That nothing therein contained shall be construed to alter, change, determine, or make void, any contracts, covenants, or agreements whatsoever, between landlord and tenant, or any other persons, touching the payment of *taxes and assessments* (b)." But neither could a case where nothing is said about *taxes or assessments*, be brought within that clause. The general expressions in the deed ought not to be extended to parliamentary impositions. They were a sort of words of course, and, in truth, meant nothing more than was comprehended in the reservation itself. With regard to the argument drawn from the time when the deed was made, it was to be considered, that the land-tax was then only occasional, and, therefore, it was not to be presumed that the parties foresaw the permanent renewal of it, or had it all in contemplation.

[627]

BULLER, *Justice*, asked, if this did not, on the pleadings, appear to be that sort of rent for which there was no remedy by distress at common law, for he conceived, that, since the statute of *quia emptores*, a rent granted in fee could not be distrained for, without an express clause making it a rent-charge; and he denied *Davenport's* answer to this, *viz.* that *fee-farm rents* were rent-charges; observing, that, by the definitions in all the books, the appellation of "*fee-farm*" only respected the proportion between the amount of the rent and the value of the land [1]. If this rent was a rent-fee, he said the distress could not be supported but on the authority of 4 *Geo. 2. c. 28. § 5.* and the avowry had not stated, (according to that

(a) 4 *W. & M. c. 1. § 6.*

(b) 4 *Geo. 3. c. 2. § 32.* 4 *W. & M. c. 1. § 34.*

[1] *Feodi Firma appellatur, cum quis, ex dono vel concessione alterius, prædita tenuerit sibi et hæredibus suis, reddendo vel dimidiam vel tertiam, vel ad minus, quartem partem veri valoris. Tenens hujusmodi ad nulla servitia obligatur nisi quæ in ipsâ chartâ continentur, exceptâ fidelitate quæ omnibus tenuris incumbet.* Spelm. Gloss. 221. col. 1; "*Chefcun fee-farm fera entend le veraye value del terre, qui est le cause n'aura ent reliefs.*" Brooke Abr. title Reliefs, 201. pl. 5. 8. Cites 45 Ed. 3. 15. and Old Tenures.

Blackstone, (*Comm.* vol. 2, p. 43.) says, "A fee-farm rent is rent-charge in fee, issuing out of an estate in fee, of at least one fourth of the value of the land at the time of its reservation." And he cites *Co. Litt.* 143.; which does, at first, seem to authorize his definition; for the words of Lord Coke are, "It, (*i. e.* a rent reserved by deed, with a clause of distress,) is called a rent-charge, because the land, for payment thereof, is charged with a distress;" and then, he goes on, immediately, to say, "If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee-farm."

that statute,) that the rent had been duly answered or paid for the space of three years, within the space of 20 years before the first day of the session of parliament when the statute passed.

1781.

BRADBURY
against
WRIGHT.

Davenport, then said, he was inclined to think, the right to distrain was admitted by the plea.

On the principal point, Lord MANSFIELD said, with regard to *Chambre's* observations on the cases, that, in none of them, was there any mention of a subsequent *land-tax*. There could be no words stronger than those in the present case; and it would not have been clearer if the deed had run, "*without any deduction, defalcation, or abatement for taxes.*" He said, he thought there were cases in the equity books on this point, and desired the cause to stand over till this day, that they might be looked into.

1. The court now, on the principal point, declared their opinion, that the rent should be paid without any deduction for the *land-tax*; and founded themselves on the authority of the cases cited from Lord *Raymond*, *Sal-keld*, *Carthew*, and 11 *Mod.* 2. As to the other point; they were of opinion against the defendant, for that the

"farm." *Blackstone*, probably, according to the most natural and obvious construction, understood the pronoun "*it*" in the second sentence, to relate to the same thing as in the former sentence, *viz.* to *rent-charge*. But it should seem, on considering the authorities above referred to, (though they do not expressly exclude the idea of distress,) together with the text of *Littleton*, that, by an inversion of language not uncommon even now, but frequently preferred, from affectation, in Lord *Coke's* time, the relative, in the second sentence, is placed before the noun substantive, *viz.* "*the rent*," to which it refers, and, therefore, the sentence ought to be understood as distinct and independent of the preceding one, and as if it had run thus: "*The rent (i. e. a rent certain reserved to a man and his heirs, which is what Littleton is speaking of,) if it be to the whole value of the land, or*

"to the fourth part of the value, is called a *fee-farm*." If this is the true construction, the inference is, that the description of *fee-farm*, taken by itself, does not imply a power of distress; which seems to have been what *Buller*, Justice, hinted at. But a rent in fee, of the proportion required, would not cease to be a *fee-farm* rent, because a power of distress was superadded. A *fee-farm* rent may either be a *rent-sec* or a *rent-charge*, and, (till the statute of *quia emptores*,) might have been a *rent-service* [†128] But then, in pleading, in order to justify in replevin, it would be necessary, not only to shew that the rent was a *fee-farm* rent, but also to call it a *rent-charge*, or to state that a power of distress was annexed to it. This, probably, could not have been done here, because, in fact, no such power was given by the deed.

[†128] *Vide* Mr. *Hargrave's* Edition of *Co. Littl.* p. 144. a. Note (5), where the very learned editor is of

opinion, "that the term "*fee-farm*" "is not properly applicable to any "rents, except *rents-service*."

1781.

BEADSBURY
against
WRIGHT.

the rent was, in its nature, a rent-*seck*, and the party could not distrain but under the statute, and therefore, in his *avowry*, he ought to have brought his case within it.

But, as the merits were in the defendant's favour, it was *agreed*, that the demurrer should be allowed, without costs on either side.

End of HILARY TERM, 21 GEORGE III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

I. N

Easter Term,

In the Twenty-first Year of the Reign of GEORGE III.

PEARSON *against* CAMPION.

1781.

Wednesday,
2d May.

DUNNING was to have shewn cause against a rule for a prohibition to the ecclesiastical court, in a suit, by an apparitor, for his fees; but he mentioned, that he found it had been decided, that a proctor or register cannot sue in the spiritual court for his fees. not maintain such a suit, and for this cited *Pollard v. Gerard (a)* [1]; and, as this case seemed to be within the same reason, he withdrew his opposition to the rule.

The rule made absolute.

(a) *B. R. M. 13 W. 3. Ld. Raym.* 703.[1] *Vide, also, Johnson v. Lee, B.R. T. 8 Will. 3. 5 Mod. 238.*The KING *against* the INHABITANTS of St. MICHAEL's, in BATH.

[630]

Saturday,
5th May.

THE court of Quarter Sessions for the county of *Somerset* confirmed an order of two justices, for the removal of *John Freeman*, from *Walcott*, to *St. Michael's*, in *Bath*, and stated;

“That the pauper, being entitled to two freehold houses in *Walcott*, one of the value of 28*l.* a year, the other of 26*l.* a year, in 1778, conveyed them by lease and release, to trustees, in trust, to be sold, and the money arising from the sale to be paid, first in discharge of two mortgages due thereon, and then in discharge of a mortgage due thereon, a residence of 40 days will not gain a settlement.

If a man who is insolvent has conveyed his estate to trustees for the payment of his debts, and afterwards, before the trust is performed, gets fraudulently into possession, a residence of 40 days will not gain a settlement.

1781.

The KING
against
St. MI-
CHAEL'S.

thereon amounting to 500*l.* afterwards to his other creditors rateably, and the surplus, if any, to him, his executors, administrators, and assigns; That the houses were both let to other persons at the time of the conveyance, and the pauper then resided in a public house in the parish of St. *Michael*, at the rent of 40*l. per annum*, which he had occupied several years, till he failed; That, afterwards, one of the houses becoming void, the trustees having the possession and the key thereof, employed one *Betty Farrant*, then a lodger in the pauper's house, to clean the said vacant house, and paid her 3*s.* for so doing, and delivered her the key for that purpose, which having done, she placed the key in the bar of the public house, among some other things of her own which she kept there, intending afterwards to re-deliver it to the trustees, but that the pauper's wife took it from thence, and took possession of the vacant house, and, with her husband, had continued there ever since to the time of the removal, being, in the whole, one year and three quarters; That one of the trustees, seeing her carrying her goods thither, gave her notice that she was doing wrong, not having the consent of either the trustees or creditors, to which she replied, "I am going to my own estate, for I and the children can't lie in the street;" That the premises had not yet been sold by the trustees; that the value thereof was about 650*l.* at present, but at the time of the conveyance was something more; That the debts owing by the pauper, for which such trust deed was executed, including the two mortgages, were 881*l.* and upwards; That it did not appear, on that deed, how the annual rents were to be disposed of, till the sale should be made."

[631]

Dunning and Burroughs, in support of the removal, contended, that the pauper had no property in *Walcott* by which he could gain a settlement, for that the conveyance divested the whole of his interest for the benefit of the creditors, the debts being more than the value. They likened this to the cases of persons entitled to administration or dower, who reside without administration being granted, or dower assigned, and cited *Rex v. Widworthy* (b), and *Rex v. Painswick* (c), to shew, that such persons do not gain a settlement [†129]. It must, they said, be intended, that the trustees were to have the immediate profits, as they had the possession. That the case of *Rex v. Natland* (d), which would perhaps be relied on by the counsel on the other side, was only an opinion of GOULD, Justice, on the circuit, and was not argued on the merits, in this court. If they were to admit that the pauper had a right

to

(b) T. 10 & 11 Geo. 2 Burr. Settl. Cases, No. 34.

(c) T. 14 Geo. 3. Burr. Settl. Cases, No. 243.

[†129] Vide *Rex v. North Curry*, M. 22 Geo. 3.

(d) M. 15 Geo. 3. Burr. Settl. Cases, No. 247.

to have resided till the sale, yet they insisted, that he could not have gained a settlement under the circumstances which had happened, because the possession was acquired by wrong.

Gould and *Morris* argued, against the orders, that the trustees had no beneficial, and the creditors no legal interest. The beneficial interest remained in the grantor till the sale, and there was no doubt but that a settlement might be acquired by an equitable estate. If this case differed from that of a mortgagor in possession, it was stronger in favour of the settlement, because a mortgagee has both the legal and a beneficial interest. This did not resemble the case of *Rex v. Widworthy*, because, till administration, nobody has a right where there are several next of kin. A sole next of kin would gain a settlement before administration. In *Rex v. Painswick*, it was argued, and could not be denied, that there were many things that might bar the dower, and prevent an assignment from being ever made. *ASTON, Justice*, was dissatisfied with the decision in that case. Here, the pauper, at any time, might have prevented the sale, by tendering the money. The trustees could not have maintained an ejectment against him till after the sale, and by joining with the vendee. These were private transactions, which the parish had no right to pry into, and the court would not, in a settlement case, enter into the amount of a man's debts, or enquire whether there would, or would not, be a surplus. They also relied on *Rex v. Natland*, and mentioned a case of a devise to trustees to sell, where the testator's children continued to reside, and gained a settlement; and said it must have been the same, if the devise had been to sell to pay debts.

LORD MANSFIELD,—If the estate on which a pauper resides is substantially his property, *that* is sufficient, whatever forms of conveyance there may be; and, therefore, a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner. But here, what interest had the pauper in this estate? He made an immediate conveyance to trustees, not a mortgage, to sell and pay off two mortgages and other debts, and when this conveyance was made, it was so doubtful whether there would be any surplus, that the deed says that he shall have the surplus, *if any*. He had only a chance of a residue, and had not a right to continue a moment in possession. A mortgagor has a right to the possession till the mortgagee brings an ejectment. After the mortgagee has got into possession *he* might gain a settlement. There is still another and a stronger ground, in this case, for the possession was gained by fraud.

1781.

The KING
against
St. MICHAEL'S.

[632]

1781.

The KING
against
St. Mi-
CHAEL'S.

WILLES, and ASHHURST, *Justices*, of the same opinion.
BULLER, *Justice*.—I am of the same opinion. To make
this resemble the case of a mortgagor, an instance must be
shewn in which the mortgagee had been in possession, and
has lost it again by fraud.

Both the orders confirmed.

Saturday,
5th May.

An original
order of
bastardy may
be made at
the Quarter
Sessions.

The KING against GREAVES.

AN original order of bastardy was made at the *Notting-
hamshire* Sessions, (*Easter 1780*), which having been
removed into this court, and a rule granted to shew cause,
why it should not be quashed, the court desired the coun-
sel against the order to begin.

Baldwin stated the principal objection to be, that the
Sessions have no original jurisdiction in making orders of
bastardy, and mentioned Dr. *Burn's* opinion and reasoning
on that point (e), and *Wood's* or *Pridgeon's Case* in *Bul-
strode* (f).

Howorth, in support of the order, said, there were four
or five cases which had decided that the statute of *Car.*
1. (g), gives the Sessions an original jurisdiction.

BULLER, *Justice*, read, from *Bott* (h), *Slater's Case* (i),
and the court were clearly of opinion, that the Sessions
have an original jurisdiction [2].

The order confirmed."

(e) *Burn's Justice*, 13th Ed. vol. 1.
p. 195.

(f) *B. R.* 13 *Car.* 1. 2 *Bulstr.* 355.
S. C. Cr. *Car.* 341. 350.

(g) 3 *Car.* 1. c. 4.

(h) *Bott* 2nd. Ed. p. 119.

(i) *B. R. E.* 13 *Car.* 1. *Cr. Car.* 470.

[2] *Vide Rex v. Cleg*, *M.* 8 *Geo.* 1.
1 *Str.* 475. where an original order
made at sessions was confirmed. It
was not objected to on that ground,
but, on the contrary, the authority
to make such an order was admitted.

Tuesday,
8th May.

PEACOCK against RHODES and Another.

A bill of ex-
change with
a blank in-
dorsement,
being stolen
and negotiated,
an innocent
indorsee shall
recover upon
it against the
drawer.

IN an action upon an inland bill of exchange, which was
tried before WILLES, *Justice*, at the last Spring Assizes
for *Yorkshire*, a verdict, by consent, was found for the
plaintiff, subject to the opinion of the court on a special
case, stating the following facts:

"The bill was drawn at *Halifax*, on the 9th of *August*
1780, by the defendants, upon *Smith, Payne, & Smith*,
payable to *William Ingham*, or order, 31 days after date,
for value received. It was indorsed by *William Ingham*,
and was presented by the plaintiff for acceptance and pay-
ment, but both were refused, of which due notice was
given

given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at *Scarborough*, received the bill from a man not known, who called himself *William Brown*, and, by that name, indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at *Scarborough*, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. *William Ingham*, to whom the bill was payable, indorsed it; *John Daltry* received it from him, and indorsed it; *Joseph Fisher* received it from *John Daltry*; and it was stolen from *Joseph Fisher*, at *York*, (without any indorsement or transfer thereof by him,) along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of *Ingham*."

Wood, for the plaintiff, argued, that the bill was taken, by *Peacock*, in the ordinary course of business, and there was no pretence that he had notice that it had been obtained unfairly. If he had, he admitted that he could not recover. A bill indorsed by the payee, is to be considered to all intents as cash, unless he chuses to restrain its currency, which he may do by a special indorsement, as, "Pay the contents to *William Fisher* (k)." The very object in view, in making negotiable securities, is, that they may serve the purposes of cash. The case of *Miller v. Race* (l), although the question there arose upon a bank-note, establishes the principle just stated. If this bill had not been stolen, but lost, the owner might have maintained *trover* against the finder, but still the *bonâ fide* holder would have been entitled to recover upon it. This was determined, with respect to a note upon a banker payable to *A.* or bearer, in the case of *Grant v. Vaughan* (m). Here, the bill was indorsed blank, but *that* was the same thing in effect, as if it had been made payable to the bearer. A blank indorsement is an indorsement to all the world; to any body who shall happen to be the bearer. There was a case of *Francis v. Mott*, directly in point to the present, tried before Lord MANSFIELD, two or three years ago. There, a bill with blank indorsements, had been picked out of the holder's pocket, at *Manchester* races. Being offered in payment to a house at *Manchester*, who did not know the persons whose names appeared upon it, they sent to inquire about their credit, and

1781.

PEACOCK
against
RHODES.

[634]

(k) *Vide Ancher v. The Bank of England*, *infra*, p. 637.

(l) *B. R. H. 31 Geo. 2. 1 Burr. 452.*

(m) *B. R. T. 4 Geo. 3. 3. Burr. 1516.*

1781.

PEACOCK
against
RHODES.

[635]

and finding them responsible, gave a valuable consideration for it, and sent it to their correspondent at London. He carried it to the drawee for acceptance, who detained it, and said it was stolen; upon which the house at Manchester brought an action against the drawer. The Attorney General was for the defendant, and Mr. Dunning for the plaintiff. The Attorney General attempted to shew, that the defendants knew the bill had been unfairly obtained, and, having failed in that proof, he gave up the cause, and the plaintiff recovered. The argument on the part of the present defendants, would extend to all cases of fraud and imposition, as well as theft, and would stop the currency of bills of exchange, because it would render it necessary for every indorsee to insist upon proof of all the circumstances, and the manner in which the bill came to the indorser. As the negligence, in this case, was on the part of the person who lost the bill, the loss ought to fall upon him; not upon the plaintiff.

Fearnly, for the defendants,—The cases on this subject are all modern, but all of them establish a distinction between bank notes, or banker's cash notes payable to bearer, and indorseable bills or notes. The two first sorts only are considered as cash. No case that I have found is exactly in point to that before the court. In *Price v. Neale* (n), which was the case of a forged bill, that had been accepted, and paid to the defendant in the course of trade, your Lordship held, that the acceptor, having given credit to it by his acceptance, should not recover back what he had paid to a *bonâ fide* holder; but, in the present case, there was no acceptance. *Walmsley v. Child* (o), before Lord HARDWICKE, was upon cash notes payable to bearer. Lord HOLT makes no distinction between bills and cash notes, in *Taffel & Lee v. Lewis* (p). So, in *Hodges v. Steward*, bills payable to bearer, and bills payable to order, are distinguished (q). Every indorsement of a bill of exchange is considered as a new bill. This was laid down by your Lordship in *Heylin v. Adamson* (r); and, in *Miller v. Race*, a bill is considered as being only a security or document for a debt. The case of the *Executors of Devallar v. Herring* (s), seems exactly in point for the defendants. It is there laid down, that, if the indorsee of a promissory note lose it, and the finder pay it away in the course of trade, the indorsee may maintain *trover* against the person to whom it has been so paid. The arguments from inconvenience are in favour of the defendants. No man is obliged to take a bill of exchange in

(n) B. R. M. 3 Geo. 3. 3 Burr.

1354.

(o) Canc. 11 Dec. 1749. 1 Vez. 341.

(p) 1 Ld. Raym. 743.

(q) B. R. 3 W. & M. 1 Salk. 125.

(r) B. R. M. 32 Geo. 2. 2 Burr.

669. 674.

(s) Scacc. T. 9 G. 1. 9 Mod. 44. 47.

in payment. A trader should not, in prudence, take a bill, unless he know the person from whom he receives it. But if the law were as contended for on the part of the plaintiff, the temptations to theft would be increased.

Lord MANSFIELD told *Wood*, he need not reply, and delivered the opinion of the court, as follows:

Lord MANSFIELD, —I am glad this question was saved, not for any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps, in the single case, (which is a hard one, but has been determined,) of a note for money won at play (t). I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and, therefore, the case is clear, and within the principle of all those Mr. *Wood* has cited, from that of *Miller v. Race*, downwards, to that determined by me at *Nisi Prius*.

The *Postea* to be delivered to the plaintiff.

(t) *Vide Lowe v. Waller*, T. 21 Geo. 3. *infra*, 736.

WORTLEY against RAYNER.

[637]

Wednesday,
9th May.

ON a plea of coverture, in an action of debt upon a judgment, a verdict was found for the defendant, and a writ of *feri facias* sued out for the costs, commanding the sheriff to levy and pay them to the defendant, and her husband. A rule was granted to shew cause, why the writ, and proceedings thereon, should not be set aside for irregularity, it being a maxim, that a person, not a party to the record, cannot be benefited, nor charged by the process, without a *scire facias*. On a plea of coverture, and a verdict for the defendant, the writ, and proceedings thereon, should not be set aside for irregularity, it being a maxim, that a person, not a party to the record, cannot be benefited, nor charged by the process, without a *scire facias*.

Cause was this day shewn; but the court was clearly of opinion, that the proceedings were irregular.

VOL. II.

P

ASHHURST,

1781.

PEACOCK
against
RHODES.

1781.

WORTLEY
against
RAYNER.

ASHHURST, *Justice*, said, the wife might have had process in her own name, because, the plaintiff having declared against her as sole, he was concluded from denying it.

The *Attorney General*, for the plaintiff.—*Dunning*, for the defendant.

The rule made absolute [1].

[1] *Vide Penyer v. Brace*, T. 9 Will. 3. 1. *Ld. Raym.* 244.

Thursday,
10th May.

ANCHER and Others against the Governor and Company of the BANK of ENGLAND.

* [638]

A bill of exchange being drawn by *A*, on *B*, payable to *C* or order, and indorsed by *C* in these words,—
“The within must be credited to *D* value in account,”—
D being indebted to *B*, and the bill being sent to *B*, and accepted by him, and he having given *D* notice that he had received it, and placed it to *D*’s account, this is such a special indorsement as restrains the negotiability of the bill. And if, afterwards, a forged indorsement purporting to be by *D* to pay to *E*, or order, is written upon it, and the bill is discounted, the person discounting it shall stand to the loss. And if an agent of *A* (*B* having become insolvent,) pay the

ONE Captain *Dahl*, a Dane, and resident in Denmark, being indebted to the house of *Claus Heide & Co.* in London, applied to one *Mæstue*, to procure him a bill, in order to discharge the debt. *Mæstue* accordingly obtained a bill from the plaintiffs at *Christiana* on *Claus Heide & Co.* with whom they had a correspondence; which bill was as follows—“*Christiana*, 17th January 1778. Two months after sight, please to pay this, our *sola* bill of exchange, to Mr. *Jens Mæstue*, or order, one hundred and twenty pounds sterling, value in account, and place it to account, as per advice from—*Karen* * widow of *Christian Ancher*, & sons.—To Messieurs *Claus Heide & Co.* of LONDON.”—On this bill was written by *Mæstue*, an indorsement in the Danish language, of this import:—“The within must be credited to Captain *Morten Larsen Dahl*, value in account. *Christiana*, 17th January 1778, *Jens Mæstue*.”—And it was remitted to *Claus Heide & Co.* in the following letter:—“Agreeable to the desire of Captain *Morten Larsen Dahl* of *Arendall*, I have inclosed for his account, sent you *Karen Ancher & sons*’ bill, on yourselves, for 120*l.* which you will, on receipt, be pleased to credit his account with, and advise him of the same.”—The bill was received by *Claus Heide & Co.* and accepted, and they gave notice to the plaintiffs, and to *Dahl*; that they had received it, and placed it to his account. Afterwards, a forged indorsement, in English, was written upon it as follows:—“For me, to pay Mr. *Detleff D. Muller*, or order. *Morten L. Dahl*.”—*Muller*, who was a clerk in the house of the acceptors, carried the bill, thus indorsed, but which had never been in the hands of *Dahl*, to the Bank, and indorsed it with his own name, upon which it was discounted, in the ordinary course of business. When the day of payment came, the acceptors having become insolvent, and *Muller* having absconded, the bill was protested; and one *Fulberg*, as a friend or agent for

money for *A*, and take up the bill, *A* may recover back the money paid by his agent to the person who discounted it, in an action for money had and received.

for the plaintiffs, came to the *Bank*, and paid it for their honour as the drawers; but, the forgery having been discovered, this action for money had and received was brought against the *Bank*, on the ground, that the bill was not negotiable, on account of the special indorsement, and that it had, therefore, been discounted by the *Bank*, in their own wrong, and the money paid by *Fulberg*, to take it up, paid by mistake.

The cause was tried at *Guildhall*, before LORD MANSFIELD, at the Sittings after last *Term*, when his Lordship directed a nonsuit: and it now came on in court, on a motion for setting aside the nonsuit, and granting a new trial.

The *Attorney General*, for the defendants,—The *Bank* is perfectly innocent of any fraud. The bill was in their hands for a valuable consideration. The drawers, by bringing this action, adopt the payment by *Fulberg*, and make him their agent, and, when a drawer pays a bill, it becomes a matter of account between him and the acceptor, and all the indorsers are discharged. This bill was originally drawn payable to order, but the particular indorsement, it is said, made it not negotiable. There can be no doubt, however, but that *Dahl* might still have indorsed and negotiated it. It is true, as his name is forged, he never can be called upon as an indorser, but his debt is discharged by the credit given him by *Claus Heide & Co.*

Dunning, and *Davenport*, for the plaintiffs,—The bill was taken up by the plaintiff's agent, without authority, but it was *bonâ fide*, and for the best, and therefore they have done right to indemnify him. The parties are all innocent, but the *Bank* have been negligent, and the mistake in paying them ought to be rectified. The *Attorney General's* rule, as to the discharge of indorsers, by the payment by the drawer, applies only where the drawer has paid with a full knowledge of the circumstances. If the *Bank*, in this case, could not have sued the drawers, they cannot retain the money; which brings it to the question, Whether a bill that has once been negotiable, must always continue so, and cannot have that quality restrained by a particular indorsement, as, "Pay to *A B*, and no one else," or the like? The constant practice, with regard to remittances of rents from the country, shews, that negotiability may be restrained in that manner. Those remittances are made by bills payable to order, but are generally indorsed by the payee to his banker, without saying "*or order*," for the express purpose of stopping their negotiability. If a bill gets to the drawee, its negotiability ceases. This has been in the hands of the drawees. Notice was given by them to the plaintiffs, that they had received it, and to *Dahl*, that they had applied it to the discharge of his debt.

1781.

ANCHER
against
The BANK
of ENGLAND

[639]

1781.

ANCHER
against
The BANK
of ENGLAND

[640]

LORD MANSFIELD, —The ground of the nonsuit was, that the purpose for which the bill was drawn was answered, it having been applied to the credit of *Dahl*, and he having acquiesced. It therefore occurred to me, that the drawers had received no injury, and had no interest. But, (which was not attended to at the trial,) there has been a second payment for the honour of the plaintiffs, and it is contended that a consideration has arisen on that second payment. — Where there is equal equity, possession must prevail; and the equity is equal between persons who have been equally innocent and equally diligent. The question, therefore, is, whether the Bank has been equally diligent. A bill, tho' once negotiable, is certainly capable of being restrained. I remember this being determined upon argument. A blank indorsement makes the bill payable to bearer, but, by a special indorsement, the holder may stop the negotiability. *Mæstue* did so here. It does not seem to me, that, after the special indorsement by *Mæstue*, *Dahl* himself could have indorsed it over. *Mæstue* did not mean to make himself answerable as an indorser, or to enable *Dahl* to raise money on the bill. The Bank could not have maintained an action, on the bill, against the plaintiffs. It was their negligence not to read the special indorsement.

WILLES, *Justice*, —I am of the same opinion. The question is, whether the negotiability is not restrained by the indorsement; and I think it is. The Bank either did read, or ought to have read, the indorsement. The only doubt is, what should be the effect of the bill's having been taken up by a third person; but I think he must be taken to be the agent for the plaintiffs.

ASHHURST, *Justice*, —I am of the same opinion. The question is, did the Bank use diligence? If they had attended to the indorsement, they would not have discounted the bill. I think *Dahl* himself could not have indorsed it. It was never the intention that *Claus Heide & Co.* should pay money to *Dahl*; but only that the amount should be set off in his account. If the Bank have taken a bill not negotiable, it is their own fault, and they are not entitled to retain the money which has been paid them by mistake.

BULLER, *Justice*, —I have the misfortune to differ from the rest of the court. As to the forgery, it was decided, in the case of *Price v. Neale*, in this court (a), that if a forged bill has been taken up, the money shall not be recovered back from an innocent indorsee. Therefore, as against such an indorsee, the forgery is not material. As to the indorsement by *Mæstue*, it amounts to an indorsement to *Dahl*, and makes him the proprietor; and, the bill being originally negotiable, it seems to me to have continued so. What is called a restrained indorsement, viz. that the bill

was

(a) *M. 3 Geo. 3. Burr. 1355. Since reported 1 Blackst. 390.*

was to be credited to *Dahl*, appears to amount to the same thing as "*Pay to Dahl*." The words "*or order*" are omitted, but it has been determined, that such omission does not stop the negotiability of a bill [†130]. The circumstance, that there was an account between *Dahl* and the drawees, cannot affect third persons who knew nothing of that account. But, if the bill was only meant to pay the drawees, why was it not cancelled by them when they received it? Why did they accept it? Did not that hold out negotiability to the rest of the world? This is an answer to any supposed negligence in the defendants. Besides, if the bill was not meant to be negotiable, why did the plaintiffs take it up? *That* was done by another person, as it is said, for their honour; but they have, by bringing the action, adopted his act.

Lord MANSFIELD,—The whole turns on the question, whether the bill continued negotiable. As the case stands at present, let the nonsuit be set aside, but we will consider of it farther, and if we alter our opinions we will mention it.

The case was never mentioned any farther.

The rule made absolute [†131].

[†130] *Edie v. The East India Company, B. R. T. 1 Geo. 3. 2 Burr.* at the ensuing Sittings, before Lord Mansfield, when the jury, by his Lordship's directions, found a verdict for the plaintiffs.

[†131] The cause was again tried the plaintiffs.

CORNU against BLACKBURNE.

Friday,
11th May.

IN an action of *assumpsit* upon a ransom-bill, which was tried before Lord MANSFIELD, at *Guildhall*, at the Sittings after the last *Term*, a verdict was found for the plaintiff, subject to the opinion of the court, on a case, which stated,

That the ship *Dolly*, (mentioned in the declaration,) was captured by the *Princesse de Robecq* privateer, commanded by the plaintiff, on the 6th of June 1780, upon the high seas, at the heighth of *Edinburgh*, in her voyage from *Lynn* to *Liverpool*, laden with corn: That the *Dolly*, and her cargo, then were the property of the defendant: That the plaintiff then was a natural-born subject of the *French King*, from whom the privateer had a commission, and that *Thomas Finchett*, the master of the *Dolly*, and the defendant, then were natural-born subjects of the King of *Great Britain*: That, at the time of the capture, a ransom bill was signed at sea, by and between the plaintiff *Finchett*, and *John Butler* the mate of the *Dolly*, (who was then given as an hostage to the plaintiff,) which ran-

An enemy's ship which has ransomed a *British* vessel, being retaken with the hostage and ransom bill on board, but the bill secreted, and not delivered up to the recaptor, the first captor may recover upon the ransom bill.

1781.

CORNU
against
BLACK-
BURNE.

* [642]

some bill is in the *French* language, and, being translated into *English*, is as follows:

No. 66. REGISTERED the present ransom bill at the Admiralty office, *Boulogne*, the 25th *October* 1779, and delivered in double to Captain *Robert Cornu*, commanding the cutter, the * *Princesse de Robecq* privateer, of this port, by me underwritten chief Register.—Signed *Merlin, Boulogne*.—“ We the underwritten *Robert Cornu* of *Boulogne*, commander of the ship the *Princesse de Robecq*, privateer of *Boulogne*, and *Thomas Finchett* of *Liverpoole*, master of the ship the *Dolly* of *Liverpoole*, have agreed as followeth, viz.—That I *Robert Cornu*, commander of the said privateer, acknowledge to have ransomed the said ship the *Dolly* of *Liverpoole*, belonging to *John Blackburne*, burgher of *Liverpoole*, burthen 105 tons, on the 6th of *June*, in the year 1780, at the height of *Edinburgh*, going from *Lynn* to *Liverpoole* in *England*, loaded with wheat, for the account of *John Blackburne*, burgher of *Liverpoole*; which vessel I have agreed to ransom for the sum of 1300*l.* sterling, to be paid to Mr. *Haußoullier*, fitter of the said privateer at *Dunkirk*; in consideration of which I have set the said vessel at liberty to go to the port of *Liverpoole*, where she is to be arrived in the time and space of three months, after the expiration of which this present agreement shall not clear her from being taken by any other privateers. For security of which ransom, I have received for hostage on board of the said ship, *John Butler*, cousin to the captain of the said vessel, desiring all friends and allies to let safely and freely proceed the said vessel to the port of *Liverpoole*, without any let or molestation, during the said time or course of her voyage; and I *Thomas Finchett*, as well in my name, as in that of the said *John Blackburne*, owner of the said ship and merchandizes, have voluntarily submitted to the payment of the said ransom, viz. 1300*l.* sterling; for surety whereof I have delivered up the said *John Butler* of *Liverpoole* for hostage, promising not to go against the conditions of this present contract, whereof each of us have a copy by us, which we have signed, with the said hostage. Signed on board the said ship, the 6th of *June*, in the year 1780. And it is further expressly covenanted and agreed, that I the said *Thomas Finchett* do bind and oblige myself, and engage my vessel and cargo, to pay or cause to be paid to the owners of the said privateer, the full amount of the said ransom, should the said hostage come to die, or to desert, or that the said privateer should perish, or be taken with the said hostage on board, without which condition the captain of the said privateer would not have consented to the

“ above

"above ransom, which, in all cases whatsoever, shall be well
 "and truly paid.—(Signed) Robert Cornu. Thomas Fin-
 "chett. John Butler."

1781.

CORNU
 against
 BLACK-
 BURNES

That the value of the *Dolly*, and her cargo then on board, amounted to the sum of 1300*l.* contained in the ransom bill. That the said ship, after her capture, and having been ransomed, was set at liberty, and, afterwards, arrived safe at her destined port of *Liverpoole*. That, on the 16th of June 1780, the *Princesse de Robecq* was taken at the height of *Yarmouth*, by two frigates belonging to the King of Great Britain, with Butler the hostage on board and carried as a prize into an English port. That at the time of the capture of the privateer, the said ransom bill was on board, but was not delivered up to the captors, nor was the same ever possessed by them. That, at the time of the capture of the *Dolly*, and at the time of the capture of the privateer, there was an open war between the King of Great Britain and the French King.

Law, for the Plaintiff,—The question is, whether the recapture of an hostage given for securing the payment of a ship's ransom, operates as a recapture of the ship itself, and destroys the contract, notwithstanding an express stipulation to the contrary in the ransom bill. The only case on this subject which is to be found in the courts of common law in this country, is that of *Ricord v. Bettenham* (a), and that case seems to be so decisive, that it will be necessary for the counsel on the other side to question some of the doctrines there established.—1. The first objection to this action is, that the plaintiff being an alien enemy, the contract is void. But the objection of war to the validity of a contract, is not universal. States at war with one another may contract for the exchange of prisoners, &c.; and individuals, for ransom, &c. The power of the individual to contract, is the same with that of the state; with this exception, that he cannot make a contract prejudicial to the interest of the state of which he is a member. This doctrine is recognized by the writers on the law of nations, and, if such contracts have (as those writers allow) a moral obligation, the law will give them a legal and compulsory obligation.—2. It will be contended, that the contract of ransom depends on the hostage, and is so interwoven and connected with the pledge, that the recapture of the one discharges the other. But it was decided in *Ricord v. Bettenham*, that the death of the hostage did not discharge the contract; that the party trusts to two securities, and though he loses one, the other continues. In order to discharge the contract by the loss of the pledge, there must be an express agree-
 P 4 ment

[644]

(a) B. R. M. 6 Geo. 3. 3 Burr. 1734. Since reported, 1 Blackst. 563.

1781.

CORNU
against
BLACK-
BURNE.

ment for that purpose, and, here, there is a direct stipulation to the contrary. This is established, not only by the decision in *Ricord v. Bettenham*, but also by two cases there cited, viz. *Sir John Ratcliff v. Davies* (a), and *The South Sea Company v. Duncomb* (b). A dictum of *Molloy* was relied on in *Ricord v. Bettenham*, where he says, "If hostages are taken, he that gives them is freed from his faith; for that, in receiving hostages, he that receives them hath relinquished the assurance which he hath in the faith of him who gave them (c)." But that passage relates to hostages between states, not individuals. It is in the chapter on alliances between *Princes*, between whom, a regard to the hostage, and the dread of each other's power, is the only security for the observance of contracts. It may be argued, that, the privateer being taken with the hostage and bill on board, this amounted to a recapture, and the ransom bill became the property of the captor. I answer, that the rights of spoliation are odious, and not to be extended to any thing not absolutely seized and reduced into possession; and for this there is an express authority in *Grotius*: "*Ex eo quod diximus,—captivos nostros servos non esse,—sequitur, cessare illam acquisitionem universalem quam accessionem esse dominii in personam diximus alibi. Non alia, ergo, captori acquiruntur quam quæ specialiter apprehenderit; quare, si quid clam secum habet captivus, non erit acquisitum, quia nec possessum.*" And he, afterwards, considers such concealed property, as so very far from being acquired by the captor, that he says; "*Cui consequens est, ut res eo modo celata ad redemptionis pretium solvendum prodesse possit, quasi retento domino (d)*" Perhaps it may be said, that, by the law of nations, the captor might take the life of the captive, and that, in consideration of departing from that right, the captive relinquishes all property in every thing on board. But the law of nations is not so. It authorises no cruelties but what may be necessary to secure the capture; and, independent of the general law of nations, there is an express stipulation on this subject between *France* and *England* in the treaty of *Utrecht*, which was copied from the marine treaty with *Holland*, of 1674.—(Lord *Mansfield* said, that clause in the treaty related only to captures in time of peace for contraband trade; but that the law of nations was as stated by *Law*.)—The ransomed ship has had the whole benefit of the ransom. If she had been taken again, the law of *France* would have protected her against such second capture, unless she had been out of her course, or beyond the time stipulated by

(a) *B. R. T. 8 Jac. 1. Yelv. 178, 9.*(d) *Grot. de Jur. Belli. L. 3. c. 21.*(b) *B. R. M. 5 Geo. 2. 2 Str. 919. § 28.*(c) *Moll. B. 1. c. 8. § 7.*

by the bill. This appears from *Valin, Commentaire sur l'Ordonnance de la Marine* (b) [as cited in *Weskett on Insurance* (c)]. There is a very curious question agitated by *Quintilian* (d), and referred to by *Puffendorff* (e), which bears a near analogy to the present. It is, How far an interest in a loan, or, more properly, how far a right to vacate and extinguish a contract made between third persons, can be acquired by war? *Quintilian* states a case, which he supposes to have been argued before the college of *Amphictyons*. The case was, that *Alexander* the Great upon taking *Thebes*, found an instrument of obligation, from the *Thebans* to the *Theffalians*, for 100 talents. The *Theffalians* then served in *Alexander's* army; and he, as a reward for their services, gave them up this instrument. The *Thebans* are supposed to have afterwards recovered possession of their own country, and to have demanded the debt before the *Amphictyons*. The arguments on the part of the demandants are stated very ingeniously in *Quintilian*, and an answer is attempted to be given to those arguments in *Puffendorff*. One of the arguments, however, to which *Puffendorff* gives no answer, and which strikes me as particularly applicable to the present question, is this: "*Non in tabulis esse jus*:" That the existence of the right did not depend on the instrument which was the evidence of it. To apply this to our case, I would say, the right to the ransom does not depend on the possession of the ransom bill. Though, if it did, *we are in possession of it*; and, therefore, are in a situation in which the *Thebans* would have been, if an accident had restored to them the possession of that instrument of which *Alexander* deprived them. But the bill is evidence of, not essential to, the right. If it had been lost, or destroyed, a court of equity would have enforced the contract; and, if the original agreement had been merely verbal, an action would have lain upon it. There seems to be no assignable difference between the capture of a ransom bill, and that of any other absolute engagement for the payment of money; a bond, for instance. And yet, it will scarce be contended that the captor of a vessel, on board of which a bond is found, acquires any property in the contract secured by that bond; or that, by delivering up the bond to the original obligor, he discharges all the remedies of the obligee against the obligor. Had the bond been lost or destroyed in the case I suppose, or the ransom bill in this, a court of equity would have enforced the contract they contained. A doubt arose, at the trial, whether the special clause in this bill, and which is not to be found in the ransom bill in the case of *Ricord v. Bet-*

1781.

CORNU
against
BLACK-
BURNE.

[646]

(b) 2 *Valin*. 288.(c) *Title Ransom*, p. 442.(d) *De Instit. Orat. L. 5. c. 10.*(e) *L. 8. c. 6. § 23.*

1781.

CORNU
against
BLACK-
BURNE.

tenham, was not inserted by the captain, after he went to sea, and without proper authority. Your Lordship desired that an enquiry should be made into that matter before the case should be argued; and we have a certificate from the officers of the marine at *Dunkirk*, declaring, that, to their knowledge, the clause was in the ransom bill before the ship sailed.—(He read this certificate.)—There has been no case like this decided at the Commons. In *August* 1779, several *English* vessels had been taken by a *French* privateer called *La Princesse de Robecq*. This privateer was afterwards captured by an *English* vessel, with the hostages and ransom bills, and the owners of the *English* vessels were condemned in salvage. But the matter was not litigated, and the payment of the salvage was made before condemnation, to furnish an answer to any claims which might be made for the ransom. There was another case of a capture by the same privateer, *La Princesse de Robecq*, which was contested; that of the *George & Nelly*. There, at the time when the captor was taken, the bill was on board, in a chest, in the cabin where the hostage also was confined during the action; but it was not found by the captor after the engagement, nor did any body know what was become of it. The court of Admiralty (a) decreed salvage to the amount of 1 of the value of the ransom bill, “for the recapture thereof, and of the hostage (b).” To ground that determination, they must have presumed a complete capture of the bill itself, and that it had afterwards been lost. But, here, that cannot be presumed, because this ransom bill exists, and was actually produced in court at the trial. I come now to consider the statute of 19 *Geo. 3. c. 67. § 44*. Independent of that statute, every thing taken from the enemy belongs to the state [1]. To bring the ransom bill within that statute, the recaptors would be bound to shew, that, at the time of their taking the *French* vessel, it came under the description of “ship or goods belonging to some of his Majesty’s subjects,” and was before taken by his Majesty’s enemies. But this description cannot apply to the hostage, nor to a ransom bill which first arose out of the capture, and never was the property of any of his Majesty’s subjects.

Wood, for the defendant,—There is no case on the subject, except *Ricord v. Bettenham*. I do not mean to question the authority of that case, nor the principles upon which it was decided. But, there, the hostage was carried

(a) 13th Feb. 1780, *Inglis & others v. Fall*.

(b) These were the words of the sentence.

[1] *Vide Wright* Justice’s opinion, to the contrary; and, “That, at com-

mon law, the subject is entitled to the property of what he takes from the enemy.” In *Morrough v. Comyns*, *E. 21 Geo. 3. B. R. 1 Willf. 211. 213.* and he cites the *Register* 102. 6, and *Bro. Tit. Property*, pl. 18. 38.

ried into the enemy's dominions, and there died; and it would be extremely hard indeed, if, because the act of God has destroyed one security, the other should be annulled. In this case, neither the ransom bill nor the hostage ever reached the territories of the enemy. It is a clear principle, that, till then, whatever has been gained by capture, may be recovered by recapture. If the prize itself had been retaken, the property of the captor would have ceased, and, the ransom bill and hostage being put in the place of the prize, the same rule should govern both. I have enquired, and find, that it is the received opinion at the Admiralty, that the capture of the hostage and ransom bill annuls the contract. There have been many decrees for salvage, besides that in the *George & Nelly*. In that case, the defence was, that the ransom bill was not seized, but the court decreed salvage and costs; and there has been no appeal. The under-writers universally understand, that, in cases of this sort, they are only to pay the salvage. If the ransom bill remained, in all events, a complete security, it would follow, that both *that* and the hostage ought to be restored by the Admiralty, in cases where they are taken. There would be instructions given to our commanders of men of war, and letters of *marque*, not to touch them. As to the special clause in this ransom bill, I understand it is quite new, and was never heard of till the present war. It was fabricated in *New England*, and adopted by the *French*. But it is a fraud on the general policy of this country, as it tends to discourage cruizers, by depriving them of the advantages arising from recaptures, and, therefore, the court will not give it effect. The insertion of it furnishes an argument, that the parties understood, that, without it, by the taking of the hostage, the contract would have been discharged. The concealment of the bill by the *French* captain was fraudulent, for there was an implied duty in him to deliver up every thing. The statute of 19 *Geo.* 3. (a) requires all papers to be sent to the Admiralty, and the captain took an oath, that all papers had been delivered up. At any rate, the bill having been on board the ship when she was taken, was, like every thing else in the ship, taken at the same time.

Law, in reply, observed, that if such oath as *Wood* had mentioned, was administered to the captain, it was without authority; and Lord MANSFIELD said, there was nothing concerning any oath stated. *Law* also observed, that the clause alluded to in the statute of 19 *Geo.* 3. only related to ship's papers.

Lord MANSFIELD,—It is sound policy, as well as good morality, to keep faith with an enemy in time of war.
This

1781.

CORNU
against
BLACK-
BURNE,

[648]

1781.

CORNU
against
BLACK-
BURNES.

[649]

This is a contract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice. The additional clause is particularly adapted to this case. There is no pretext to impeach it, on the ground of fraud or extortion. The bill was registered before the *French* ship sailed, with this clause in it. Nor does any inference arise, from its insertion, that the general law was understood to be otherwise; for it is, also, stipulated, that the death of the hostage shall not vacate the contract, which stipulation the parties must be presumed to have known to be unnecessary, because the decision in *Ricord v. Bettenham* was notorious over all *Europe*. Learned lawyers were written to on that occasion, both in *France* and *Holland*, and Mr. Justice BLACKSTONE shewed me several letters he had received from abroad, on the subject. It is said, that, by the law of nations, the recapture puts an end to the ransom bill; and the argument is, that the court of Admiralty decrees salvage for retaking the ransom bill. But what are the cases brought to prove this position? None of them were litigated but the last, and, there, no ransom bill was forth-coming. Upon what was salvage given in that case? They seem to have mistaken the nature of salvage. They seem to consider it as a debt which may be exacted. But no man can be compelled to pay salvage, unless he chooses to have the property back. They have confounded distinct subjects. What is the eighth part of a ransom bill? Can the eighth part of an hostage be claimed as salvage? Could the recaptor make use of the ransom bill? Could he bring an action on it in the foreign captain's name? When the owner gets possession of the ransom bill, it may be a different consideration. But the present case is clear on two grounds. 1. The special clause is decisive; and, 2. Independent of that clause, there never has been any capture of the ransom bill. The authority from *Grotius* is very strong on this last ground.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*, of the same opinion.—The last ground goes all the length; for the bill was never taken.

The *Poslea* to be delivered to the plaintiff [1].

[1] A subsequent case upon a ransom bill, viz. *Antoon v. Fisher & another*, which is now depending for the judgment of the court (a), came on for argument in *Easter Term*, 22 Geo. 3. when it was spoken to by *Larv*, for the plaintiff, and *Baldwin*, for the

defendants. Afterwards, Lord Mansfield directed, that it should be again argued by a civilian on each side, and, in *Trinity Term*, 22 Geo. 3. on Friday the 14th of June, Dr. Wynne, the *King's Advocate*, was heard for the plaintiff, and Dr. Scott, for the defendants.

(a) Vacation after T. 22 Geo. 3.

defendants. In that case, the ransom bill declared on was in the same form with that in *Cornu v. Blackburne*. Besides the general issue, the defendants pleaded, specially,—That, after the ransom of their ship, (*The Peace*,) the captor's ship, (*viz.* a French privateer, called *Le Compte de Guichen*,) while cruising with the ransom bill and hostage on board, and before the captured ship or the ransom bill or hostage had been carried to, or within, any part of the dominions of the French King, was taken as a prize, by the *Aurora*, an English ship of war, and, with the ransom bill and hostage, brought into England: That the captain of the *Aurora* requested the captain of the French ship to deliver up all the ransom bills and papers which were on board his ship when it was taken, but that he did not deliver up the ransom bill in question, but fraudulently and deceitfully concealed and withheld it, and falsely and fraudulently declared that he had delivered up all the ransom bills which were on board when his ship was taken: That, before the action brought, the French ship was condemned as lawful prize—There was another special plea of the same import, but not mentioning the hostage. The plaintiff demurred to both the special pleas, and assigned for cause, that they amounted to the general issue.—That point, however, was little relied on, and seemed to have no weight with the court. The main question argued was the same as in *Cornu v. Blackburne*. Dr. Scott, besides the former point, (*viz.* that the actual or virtual recapture of the ransom bill annihilates the contract, or

rather, as Dr. Scott put it, transfers the right from the original captor to the recaptor,) contended, that *questions on ransom bills arise out of matter of prizes: are to be decided by the *jus belli*; and, therefore, are not triable in this court, but belong exclusively to the court of prize. To this Dr. Wynne answered, that, though the contract of ransom happens to be connected, in point of time, with the capture as prize, it does not necessarily arise out of it, but is, in truth, a mere simple contract of sale, between individuals, who, at the time, and for the purpose of the contract, are considered as not being the subjects of hostile states. A great variety of new authorities were cited, chiefly from foreign writers, and particularly many passages in *Valin's Commentary* on the French Ordinance of 1681, which had been pointed out by Lord Mansfield, when he directed that the case should be argued by civilians. Most of those passages, as far as *Valin's* opinion goes, are in favour of the position, that the recapture of the ransom bill puts an end to the claim of the captor. In one place he says:—"Si le preneur est pris lui-même avec le billet de rançon, il perd sa rançon avec son propre navire, et la tout passe au preneur dont il est la conquête." 2 Val. Liv. 3. Tit. 9. Art. 19. p. 286. [†132]. For more concerning the Law of Ransoms, *vide Yates v. Hall*, B. R. M. 26 Geo. 3. 1 Term Rep. 73 to 81.

1781.

CORNU
against
BLACK-
BURNES.

* [650]

By

[†132] In Michaelmas Term, 23 Geo. 3. *Anthorn v. Fisher* stood for judgment, when Lord Mansfield delivered his opinion in favour of the plaintiff; but *Willes*, and *Buller*, Justices, thinking the courts of common law had no jurisdiction, and that that objection might be taken, although not particularly pleaded, and *Ashurst*, Justice, expressing doubts on that point, judgment was, *pro forma*, given for the plaintiff, in order to give an opportunity of bringing a writ of error.

This was afterwards done, and, in *M. 25 Geo. 3.* by the unanimous opinion of all the Judges of the Common Pleas and the Exchequer,—who concurred in holding, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war,—the judgment given in the court of King's Bench was reversed. *Vide Poreau v. Hartley*, B. R. T. 23 Geo. 3. & *Gist v. Mason*, B. R. H. 26 Geo. 3. 1 Term Rep. 84, 85.

1781.

CORNU
against
BLACK-
BURNE.

By 22 Geo. 3. c. 25. it is enacted, "That it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming, any ship or vessel belonging to any of his Majesty's subjects, or any merchandizes or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against

his Majesty's subjects" (§ 1.). By § 2. "all contract and agreements which shall be entered into, and all bills, notes, and other securities, which shall be given by any person or persons for ransom of any such ship or vessel, or of any merchandize or goods on board the same, shall be absolutely void in law, and of no effect whatever." And, by § 3. a penalty of 500*l.* is given to the informer, for every offence against the act. This statute has put an end to all questions, in future, on the law of ransoms.

Monday,
14th May.

EDDIE against DAVIDSON.

If on an execution against one of two partners, the partnership goods are taken and sold, the sheriff is to pay over to the other a share of the produce proportioned to his share in the partnership effects.

THE defendant was partner with one *Birnie*, against whom a commission of bankrupt had issued, but, before the bankruptcy, the plaintiff had sued out execution on a bond of the defendant's, for 700*l.* and the sheriff had levied on the partnership effects. *Birnie's* assignees obtained this rule, to shew cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an *affidavit* of *Birnie's*, that he was entitled to an equal share of the partnership effects, as partner with *Davidson*. The plaintiff's *affidavit*, on shewing cause, denied that *Birnie* had an equal * share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount.

* [651]

The court directed that it should be referred to the Master to take an account of the share of the partnership effects to which *Birnie* was entitled; and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees [1].

The *Attorney General*, and *Douglas*, for the plaintiff.—*Howorth* and *Bower*, for the assignees.

[1] *Vide* *Bachurst v. Clinkard*, B. R. M. 2 W. & M. 1 Show. 173. and *Heydon v. Heydon*, B. R. M. 5 W. & M. 1 Salk. 392. [† 133]. *¶ Vide*,

also, *Skipp v. Harwood*, Canc. 1747, mentioned by Lord Mansfield, *Comp.* 449.

[† 133] *Vide* *Comb.* 217. and *Jacky v. Butler*, B. R. E. 2 Ann. 2 Ld. Raym. 871.

1781.

PAYNE and Others *against* BACOMB.Wednesday,
16th May,

THIS was an action of *assumpsit*, tried on the last Home Circuit, before ASHHURST, *Justice*.—The first count of the declaration set forth a special agreement, by which the defendant undertook to contribute to the expense of a suit for tithes then depending in the court of *Exchequer*. To this was added a count for money laid out and expended; and another upon an *in simul computasset*.—The plaintiffs endeavoured to prove the agreement, but failed; upon which they were going into evidence on the general counts.—The Judge would not permit this to be done, and directed a nonsuit.—The case now came on in court, upon a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, on the ground of a misdirection.

LORD MANSFIELD,—This was formerly the rule, when the fashion was, to lay hold of a nonsuit wherever it could be done. When I went the Western Circuit, a case of this sort came before me. I was strongly inclined against the practice, and permitted the plaintiff to go into the general counts, and I consulted Sir EARDLEY WILMOT, who went the circuit with me, and he approved of it [1]. It was afterwards mentioned to the other Judges, who concurred with us in opinion.

The rule made absolute.

[1] His Lordship probably meant 1759. *Law of Nisi Prius*, Ed. of 1775. *Harris v. Oke*, *Winch. Summ. Assizes*, p. 139.

WHITCOMB *against* WHITING.[652]
Thursday,
17th May.

DECLARATION, in the common form, on a promissory note executed by the defendant; *Pleas*; the general issue, and *non assumpsit infra sex annos*; *Replication*, *assumpsit infra sex annos*. The cause was tried before HOTHAM, *Baron*, at the last Assizes for *Hampshire*. The plaintiff produced a joint and several note executed by the defendant, and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On Friday, the 4th of May, a rule was granted to shew cause, why there should not be a new trial, on the motion of Lawrence, who cited *Bland v. Haslerig* (a); and,

(a) C. B. H. 1 & 2 W. & M. 2 Ventr. 151.

1781.
 WHITCOMB
 against
 WHITING.

and, this day, in support of the application, he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case, the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of *Heylin v. Hastings* (b), reported in *Salkeld* (c) & 12 *Modern* (d); and, in *Hemings v. Robinson* (e), it was decided, that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note, against the drawer, and the plaintiff proved the acknowledgment of a *mesne* indorser that the indorsement on the back of the note was in his hand-writing; but the court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

[653]

LORD MANSFIELD,—The question, here, is only, whether the action is barred by the statute of limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one, is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

WILLES, *Justice*,—The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

ASHHURST, and BULLER, *Justices*, of the same opinion.

The rule discharged [1] [† 134.]

(b) *B. R. H.* 10 *Will.* 3.

(c) 1 *Salk.* 29.

(d) 223.

(e) *C. B. M.* 6 *Geo.* 2. *Barnes Qto* Ed. 436.

[1] The case of *Bland v. Haslerig*, (cited *supra*, p. 652. Note (a).) was a joint action against four: the plea, the statute of limitations; and a verdict, that one of the defendants did assume within six years, and that the others did not; and it was held, by *Pollexfen*, *Ch. J.* *Powell*, and *Rokeby*, (against *Ventris*.) that the plaintiff

could not have judgment against that defendant who was found to have promised within the six years.—That case may be explained on the manner of the finding; for, as the plea was joint, and the replication must have alleged a joint undertaking, the verdict did not find what the plaintiff had bound himself to prove. But, according to the principle in this case of *Whitcomb v. Whiting*, the jury ought to have considered the promise of one as the promise of all, and, therefore, should have found a general verdict against all.

[† 134]

[134] The following case was argued and determined, *B. R. H. 23 Geo. 3.*

CARVICK V. VICKERY.

This was an action by the indorsee of a bill of exchange, which was in the following form:

"Mr. *Abraham Vickery*,

Two months after date, please to pay to us or our order the sum of, &c.

John Maydwell

John Maydwell."

It was indorsed thus:

"*Jn. Maydwell.*

Holloway."

The *Maydwells* were father and son. The indorsement was by the son. They were admitted not to be partners. The bill, when due, was presented to the defendant, and accepted; and, at the time of the acceptance, he wrote upon it a direction to his banker to pay it. The cause was tried, at the Sittings after *M. 23 Geo. 3.* at *Guildhall*, before Lord *MANSFIELD*, who nonsuited the plaintiff, because there was not an indorsement by both the parties to whose order the bill was made payable. In *H. 23 Geo. 3.* *Howorth* obtained a rule to shew cause, why there should not be a new trial; and the case was argued, on *Saturday*, the 1st of *February* 1783, by *Wallace*, and *Law*, for the defendant, and *Howorth*, and *Wood*, for the plaintiff.

In support of the nonsuit, it was insisted, that it was clear, when two or more persons are the payees of a bill of exchange, (which in this case the drawers were,) and there is no partnership between them, the indorsement of one will not bind the rest, nor make the bill negotiable. The only reason for the names of both the father and the son appearing to this bill, must have been, to prevent its being paid without the joint order of both. Even if the indorsement had been specially by the one, to pay for himself and the other, yet, without evidence of a partnership, the other would not have been bound. The first promise of the

acceptor was to pay to the order of two, and a new promise to pay to the order of one against *WHITCOMB* could not be raised, *WHITING*. without a consideration. It would be a *nudum pactum*. Indeed, where there is a partnership, the acceptance of one partner does not bind the others, unless the bill concerns the partnership trade. This was determined in the [654] case of *Pinkney v. Hall* (a). The same thing must hold as to indorsements. If there is no case exactly on the subject, it is because the matter has never been doubted. *Whitcomb v. Whiting* may be cited on the other side; but it is not *ad idem*. The statute relative to promissory notes (b) only enables such servant or agent as is usually entrusted by the principal, to bind him by his signature (c). A partner's signature binds the partnership upon that ground; for every partner may be considered as an agent for the rest of the partnership.

On the other side, it was argued, that two persons, by joining in the same bill, hold themselves out to the world as partners, and, therefore, for that purpose, are to be treated and dealt with as such. It appears by the evidence, that the acceptance and order to the banker were after the indorsement; that order, therefore, amounted to a recognition of the power of the one to bind the other. Besides, the son had the custody of the bill, which implied an authority from the father to negotiate it.—They cited *Whitcomb v. Whiting*.

Lord *MANSFIELD*,—I have looked into that case, and do not think it *ad idem*. The general question is of great importance, *viz.* Whether an undertaking, by a bill of exchange, to pay A. and B. is an undertaking to pay A. or B. We will, therefore, take sometime to consider of it. As to the order to the banker, it seems to me nothing more than a direction to pay to persons properly authorized.

WILLES, Justice,—I incline to think

(a) *B. R. 8 W. 3. 1 Salk. 126.*

(b) 3 & 4 *Ann. c. 9.*

Vol. II.

(c) § 1.

1781.
 WHITCOMB
 against
 WHITING.

think the order to the banker a recognition of the indorsement. ASHHURST, *Justice*.—I do not think the order acknowledges the authority of the indorsement. If the banker had afterwards discovered that the indorsement was forged, he might have refused payment.—(*Wallace* had mentioned a case from *Bristol*, of a draft on Messrs. *Hoares* accepted by Messrs. *Childs*, where that happened.)

BULLER, *Justice*.—I think the order to the banker makes no difference. But it seems to me, that, when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so.

The court took time to deliberate; till *Tuesday*, the 4th of *February*, when Lord MANSFIELD delivered their unanimous opinion, that the *Maydewells* by making the bill payable “to our

order,” had made themselves partners as to this transaction.

The rule made absolute.

At the ensuing Sittings, at *Guildhall*, on *Monday*, the 3d of *March* 1783, the new trial came on, before Lord MANSFIELD, and a special jury; when *Wallace*, for the defendant, stated and offered to prove, that, by the universal usage and understanding of all the bankers and merchants in *London*, the indorsement was bad, because not signed by both the payees.

Howorth, on the other side, objected to any evidence of that sort; insisting, that the point was a question of law, and had been decided by the court.

Lord MANSFIELD said, he did not think the question was so decided as to preclude the evidence offered; and, therefore, over-ruled the objection.

Wallace then called Mr. *Gosling*, an eminent banker, to prove the usage; but the jury, *undâ voce*, declared they knew it perfectly to be as he had stated it; and, without hearing the witnesses, found a verdict for the defendant.

* [655]

Friday,
 18th May.

A personal representative having found among the papers of the deceased a mortgage deed, and having assigned it more than six years ago for the mortgage money, affirming and reciting in the deed of assignment that it was a mortgage deed

made or mentioned to be made between the mortgagor and mortgagee for that sum, the assignee shall not recover back the mortgage money, although it shall turn out that the mortgage was a forgery, and that the assignee did not discover the forgery till within six years before he brings his action, unless the assignor knew it to be a forgery.

BREE against HOLBECH.

IN an action of *assumpsit* for 2000*l.* had and received to the plaintiff's use,—The defendant having pleaded the general issue, and the statute of limitations,—The plaintiff replied; * That the writ was sued out on the 22d of *August* 1780; that, on the 18th of *February* 1773, the defendant asserted and affirmed, that there was an indenture of mortgage, dated the 24th of *June* 1768, made or mentioned to be made, between F. and S, of the one part, and W. H. (the defendant's uncle,) on the other, for a term of years, granted to the said W. H. as a security for the payment of 1200*l.* with interest; that the defendant then further asserted and affirmed, that, after making the said indenture, W. H. died; that the defendant was his administrator with the will annexed, and there was due

due to him, as administrator, the said principal sum on the said security; that the plaintiff, relying on these assertions and affirmations, advanced 1200*l.* to the defendant, on his executing an indenture of assignment, on the said 18th of February 1773, which recited the mortgage, and purported, for the consideration of the 1200*l.* so advanced, to assign all the premises by the said recited indenture of mortgage granted, for the remainder of the term, subject to the original power of redemption; that, in this indenture of assignment, the defendant agreed with the plaintiff, that neither the said *W. H.* nor the defendant, had done any act to incumber the mortgaged estate; that the said several assertions and affirmations of the defendant, and also the recitals in the said indenture of assignment, were false, inasmuch as there never was any such indenture of mortgage, nor the sum of 1200*l.* nor any other sum, due to the defendant, as administrator of *W. H.* on such security, in the manner the defendant had asserted and affirmed, and as in the indenture of assignment was recited, or in any other manner, and that neither the premises, nor any part thereof, passed by the assignment, to the plaintiff, nor did any estate, right, or title, therein, or to the said sum of 1200*l.* vest in him; that, by fraud and imposition, and by means of the said false assertions and affirmations, and false recitals, the plaintiff was induced to pay the said sum of 1200*l.* on the execution of the said indenture of assignment; that, at the time of the execution thereof, and of paying the money, the plaintiff was ignorant of the falsehood of the said assertions, affirmations, and recitals, and of the fraud so practised upon him, and did not discover them till within the space of six years next before suing out the writ [1].—To this replication, the defendant demurred generally. The case was, this day, argued by *Hill*, Serjeant, for the plaintiff; and *Chambre*, for the defendant.

Chambre, in support of the demurrer, contended, that there was nothing alleged in the replication which could take the case out of the statute. There was no fraud stated to have been practised by the defendant; for it was not averred, that he knew of the falsehood of the different assertions and recitals. But, if there had been fraud, that would not have been sufficient; it was the plaintiff's business to look to the validity of his security; and there is nothing relative to fraud among the different exceptions and savings in the statute.

Hill, Serjeant, insisted; 1. That, in point of law, this was fraud on the part of the defendant, although he himself

1781.

BREE
against
HOLBECH.

[656]

[1] The mortgage deed was one of in eminent practice at *Coventry*, and the many forgeries which had been which were not discovered till after committed by one *Dadley* an attorney his death.

1781.

BREE
against
HOLBECH.

self might not know of the falsehood; 2. That, where a party has been induced, by fraud, to pay money, the statute of limitations does not run, or, at least, only runs from the time when the fraud is discovered.—1. The assertions of the defendant, he observed, were positive; without qualification, and, therefore, he made himself answerable for the truth of them; and, if any loss had been incurred by his mistake, it ought to fall upon him, not upon an innocent third person. On this first head, he cited, 1 *Show.* 68. 3 *Mod.* 261. *Comberb.* 163. *Hearne's Pleader*, 102. 224. *Gro. Car.* 141. *Sir W. Jones*, 196. 2 *Burr.* 112. 12 *Mod.* 494. 2 *Vez.* 198.—2. On the second point, he relied on *Booth v. Lord Warrington*, in *Dom. Proc.* 1711. (which he cited from the printed cases,) and *The South Sea Company v. Wymondsell*, 3 *P. Will.* 143 (a).

Lord MANSFIELD,—The basis of the whole argument is fraud; and the question is, whether fraud is any where asserted in this replication. There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent; as in the case of *Sir Crisp Gascoyne*, who insured a life, and affirmed it was as good a life as any in *England*, not knowing whether it was, or was not. There may be cases too, which fraud will take out of the statute of limitations. But, here, every thing alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage deed among the papers of his testator, without any arrears of interest, and parts with it, *bonâ fide*, as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but, only, that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it.

Hill had leave to amend, in case, upon inquiry, the facts would support a charge of fraud.

(a) *Canc. M.* 1732.

Wednesday,
23d May.

The KING against the INHABITANTS of
HULLAND.

When a pauper has resided part of the year in one

parish, and part in another, at different times and intervals, making when added together more than forty days in each, his settlement is in the parish where he slept the last night.

THE court of Quarter Sessions for the county of Derby quashed an order of two Justices, for the removal of

of a pauper and his family, from the liberty of *Hulland*, to the parish of *Bradley*; and stated specially as follows:

1781.

The KING
against
HULLAND.

At *Whitsunday* 1768, the pauper, who was a blacksmith, being then a single man, hired himself at *Hulland*, for a year, to one *Joseph Copstake*, blacksmith, who had a house and shop at *Bradley*, and another house and shop at *Hulland*, and who resided occasionally at each place, but whose family resided constantly at *Bradley*. The pauper served the year. He worked at the shop at *Hulland*, and lay there five nights in the week during the year, except three weeks together in the latter end of *February* and the beginning of *March* 1769, and sometimes a night or two in the week besides, when he lay at *Bradley*, and on the *Saturday* and *Sunday* nights the year through, he lay at *Bradley* and never at *Hulland* on those nights. He never resided 40 days together in either place; but resided more than 40 days at each in the year, and the last two nights in the year he resided at *Bradley*.

Dunning, and *Parker Coke*, shewed cause, in support of the order of Sessions. They argued, that, where there is a mixed residence of this sort, the best rule is, what the Sessions had followed, viz. to count backwards in each parish, and to establish the settlement where you first find forty days. In the case of *Rex v. Lowes* (a), which had been cited when the rule was moved for to quash the present order, it appeared, that, during the greatest part of the end of the year, the pauper had lodged in the parish where he had resided the last night. Neither the arguments of the counsel, nor of the Judges, are stated in the report of that case; but it is probable the court went upon that ground, and not on his having slept the last night in the parish where they determined his settlement to have been gained.

[658]

Balguy, on the other side, insisted, that the principle of the determination in *Rex v. Lowes*, was, that the last night of the residence was to be connected with the former service in the same parish, and reckoned as one and the same. That the decision did not proceed on the majority of time in the latter part of the year.

Lord MANSFIELD absent.

WILLES, *Justice*.—There must be some principle to govern such cases as this. Mr. *Dunning* has cited no authority in support of his position, that the majority is to be the rule, and indeed it is hard to say, here, in which of the two parishes the pauper resided most. The rule laid down by Mr. *Balguy* seems a very good one.

ASHHURST, *Justice*.—This case, from its circumstances, does not afford much room for argument. There ought if

Q3

(a) E. 16 Geo. 3. Burr. Sett. Ca. No. 258.

1781. if possible to be a *certain* rule, and the case cited seems to furnish one which is very reasonable.

The KING
against
HULLAND.

BULLER, *Justice*.—It is in general of much more importance to have a fixed rule, than what the rule is. If that which Mr. *Dunning* contends for had been established, it might have been a very proper one; but the court, in the case of *Rex v. Lowes*, can hardly have gone upon that ground, because it does not clearly appear there, in which of the two parishes the longest residence had been [1].

The order of sessions quashed.

[1] It was mentioned by a gentleman at the bar, that he recollected *Aston, Justice*, in the case of *Rex v. Lowes*, to have given his opinion expressly on the circumstance of the last night [†135]. The same

principle is recognized as to settlements gained by apprenticeship, by *Willes*, and *Buller, Justices*, in *Rex v. Sandford*, 1. 26 *Geo. 3. 1 Term Rep.* 281. 284, 285.

[†135] In *Rex v. Iveston*, E. 23 *Geo. 3.* the rule in *Rex v. Lowes*, as stated in the present case by *Balguy*,

was confirmed by Lord *Mansfield*, and the rest of the court.

[659]

Wednesday,
23d May.

The KING against the INHABITANTS of NORTHFIELD.

A marriage is void, and no settlement is gained by it, if celebrated in a chapel erected since 26 *Geo. 2.* although marriages may have been *de facto* frequently celebrated there.

TWO Justices had made an order to remove *Abigail Jones*, the widow of *Joseph Jones*, from the parish of *King's Norton*, to the parish of *Northfield*; which last parish appealed to the Quarter Sessions; and they confirmed the original order; and stated specially:

That the pauper *Abigail Jones*, being, whilst sole, a settled inhabitant at *King's Norton*, in the year 1773 intermarried with *Joseph Jones*, a settled inhabitant at *Northfield*, at *Buerlyhill chapel*, in the parish of *Kingswinford*, in the county of *Stafford*, which was erected in the year 1765, and then duly consecrated, and in which divine service had been publicly and regularly celebrated ever since; and wherein banns of marriage had been often published, and marriages celebrated previous to the marriage in question: That the said chapel was a new one, erected since the marriage act, and not erected on the foundation of one that was ancient; and no act of parliament was obtained for erecting the said chapel, or for celebrating marriages there.

The two orders being removed by *certiorari* into this court, the only question appeared to be, whether the marriage, upon the facts stated relative to the chapel, was void, by the provisions of the statute of 26 *Geo. 2. c. 33.*

It

It is enacted, by § 1. of that statute, that, from and after the 25th of *March* 1754, all banns of matrimony shall be published in the parish church, or in some public chapel, *in which public chapel banns of matrimony have been usually published*, of or belonging to the parish or chapelry wherein the persons to be married shall dwell; and, by § 8. that, if any person shall, (from or after the date above-mentioned,) solemnize matrimony in any other place than a church, or public chapel where banns have been usually published, unless by special licence, &c. every person knowingly and wilfully so offending, shall be deemed guilty of felony, &c. and all marriages solemnized, (from and after, &c.) in any other place than a church, or public chapel, (unless by special licence, &c.) shall be null and void to all intents and purposes whatsoever.

When the *Attorney General* moved for a rule to shew cause, why the orders should not be quashed, Lord MANSFIELD seemed to discourage the attempt to try a question of such serious consequence, in a collateral way, on a settlement case; and said, he would turn the parish complaining of the removal, round, if he could.

Bearcroft now shewed cause. He admitted, that, when the validity of a marriage under the marriage-act, becomes a question in the case of a settlement, it is not necessary that there should have been a sentence of the spiritual court, in order to entitle the parties interested to shew the nullity of such marriage. This had been determined in the case of *Rex v. Preston near Faversham* (a). But he contended, that the words "*usually published*" in the act, ought to be construed to mean, "*usually published at the time when the marriage in question took place*." If so, there was enough stated in the case, for the court to consider this as a chapel in which banns had been usually published. The word "*often*" is nearly tantamount to "*usually*;" but, if it were not, yet, as it is a rule that an order of sessions is always to be supported, unless something appears expressly on the face of it which shews it to be against law, the court would intend this to be such a chapel as the act required, there being no direct assertion of the contrary. The act, he said, was supposed to have been drawn by a very eminent person (b); it had been warmly opposed; and, if the intention had been to restrain the celebration of marriages to parish churches and to chapels in which banns had been usually published before the act, it was probable an explicit enactment to that effect would have been introduced. If the construction contended for on the other side should prevail, this act would prove a trap to clergymen and innocent persons, who could not be

1781.

The KING
against
NORTH-
FIELD.

[660]

(a) *M. 33 Geo. 2. Burr. Settl. Ca.* No. 154. (b) Lord Hardwicke.

1781.

The KING
against
NORTH-
FIELD.

be expected to search into history, to discover the exact time when marriages first began to be celebrated in any particular chapel. It was hard perhaps to draw a line, but, here, an usage was clearly established long before this marriage took place.

The *Attorney General*, and *Batt*, argued against the validity of the marriage. They said, the act was to be construed as if the case had happened the day after it passed. Usage *since* could not vary the case; for, to give operation to usage, it must have a legal commencement, because *quod ab initio non valet, tractu temporis non convalescit*. Arguments of hardship and inconvenience could only be resorted to, when the law was doubtful, but here the words of the statute were clear. This was no more a trap than any other prohibitory law. After the passing of the act, no marriages had been attempted to be celebrated in *Lincoln's-Inn Chapel*, *Gray's-Inn Chapel*, and many others, although they were old chapels; because banns had not been usually published in them; and it would be absurd, if a chapel erected since the act should be in a better situation, in that respect, than those which had existed long before.

[661]

Lord MANSFIELD, — For a long time, I was much averse to a determination of this point, in such a question, and between such parties. But, upon more consideration, I think we ought now to decide it. If there has been an abuse, we ought to stop it as early as possible. A delay might lead to a supposition that we doubt, where in truth we do not; and any subsequent inconvenience, in consequence of our supposed doubt, would be chargeable upon us. I remember, when I was *Attorney General*, I was obliged to prosecute the minister of the *Savoy*, who insisted on the right of marrying without licence, and taking advantage of a dispute then subsisting between the Crown and the duchy of *Lancaster*, sheltered himself sometimes under the one, and sometimes under the other. He had married many couples in a year, and many children had been born under those marriages. But it was necessary to stop the abuse, even after it had gone so far; and he was convicted. Time, or the interposition of the legislature, may cure the marriages which have been already solemnized in this chapel [1]. The act clearly meant chapels existing at the time. It says church or chapel belonging to the parish or chapelry where the parties

[1] As soon as the determination of the court in this case was known, Lord *Beauchamp* introduced a bill into parliament, which passed into a law, for making all marriages which had been celebrated in any parish church or

public chapel, erected since 26 Geo. 2. c. 33. and consecrated, valid in law, and to exempt the clergymen who had celebrated such marriages, from the penalties of that statute. *Vide* 21 Geo. 3. c. 53.

parties reside. There is no chapelry here. I am of opinion, that this marriage was void by the provisions of the statute. 1781.

Both the orders quashed.

The KING against PITTS.

[662]

Friday,
25th May.

ON Friday, the 4th of May, *Bearcroft* obtained a rule to shew cause, why an order of bastardy made upon the defendant, by two Justices for the county of *Hereford*, and confirmed by the court of Quarter Sessions for that county, should not be quashed. The objections he then stated were; 1. That, in the caption, the two Justices were said to be "residing near unto the limits of the parish of, &c." and the words of the statute are, "in or next unto the limits, &c." (a); 2. That the order contained no *express* adjudication, and was therefore void; according to the case of *Rex v. Perkasse* (b). An order of bastardy stating "where- as it hath appeared to us, &c." without an *express* adjudication that the person charged is the putative father, is void.

On Saturday, the 19th of May, *Bower* shewed cause.

Upon examining the original order, it appeared, that the word in the caption was "next" and not "near;" and there remained, therefore, only the second objection to be considered. The order, was, in a great measure, in the same form with the precedent in *Burn's Justice* (c), but with the omission of the following clause:

"We, therefore, upon examination of the cause and circumstances of the premises, as well upon the oath of the said *A. B.* as otherwise, do hereby adjudge him the said *C. D.* to be the reputed father of the said bastard children."

Bower contended, that, as the statute of *Elizabeth* does not prescribe any particular form, if enough appears on the face of the order to authorize the act of the Justices in charging the supposed father, that is sufficient. The case in *Siderfin* is not so decisive as it would seem to be from the manner in which it is stated by *Burn* (d), for it appears, in *Siderfin*, that the objection on which the order was quashed, was, that the sum was unreasonably small (*viz.* 2d. per week,) and this point about the adjudication is mentioned *after* the decision, and, then, without any *positive* opinion of the court upon it. The same principle must govern with regard to orders of bastardy and orders of removal, and none of the determinations upon orders of removal will be found to warrant the present objection. In *Rex v. Westwood* (e), there was

[663]
nothing

(a) 18 *Eliz. c. 3. § 2.*

(b) *E. 20 Car. 2. 2 Sid. 363.*

(c) 1 *Burn. 189. 13th Ed.*

(d) 1 *Burn. 193. 13th Ed.*

(e) *H. 4 G. 2. 1. 1 Stra. 73. Bott.*

1781.
The KING
against
PITTS.

nothing in the order to supply the want of an express adjudication. The same observation applies to *Rex v. Minchinhampton* (c), for it was not at all stated, there, that the pauper was likely to become chargeable. In *Stallinburgh v. Haxhay* (d), the words only were, "*we do believe*;" in *Waltham Magna v. Waltham Parva* (e), "*as we are credibly informed*;" and, in *Berry v. Arundel* (f), "*whereas complaint hath been made to us*." In the present case, the Justices have expressly said, "*whereas it hath appeared to us, &c.*" and, in *Suddlecomb v. Burwash* (g), Lord HOLT said, *that was sufficient*; and the same thing was afterwards determined in a case of *Rex v. Darnal* (h), mentioned in the Report of *Suddlecomb v. Burwash*. *Bearcroft*, on the other side, insisted, that the adjudication is the most important, and an indispensable part of the order, and cannot be supplied by implication. It is true, the court is not so strict, with regard to orders of Justices, as in the case of convictions, but still, it *must* appear, upon the order, that the Justices had an authority for what they did; and, without an adjudication they have no authority. They act both as jury and judges, and the order must contain both a verdict and judgment. In indictments founded on the *common law*, nothing can be supplied by inference; and, *a fortiori*, nothing so material as the adjudication can be intended in the case of particular jurisdictions created by *statute*. If defects of this sort could be cured by intendment, no order would ever have been held to be bad. The court will pay regard to precedents long established, and approved; and this order, though framed after the precedent in *Burn*, has left out the most essential part. In *Rex v. Perkasse*, the rule to *shew cause* was granted on the objection as to the smallness of the sum; but it is clear, from an attentive perusal of the case, that the ultimate decision went upon the want of adjudication. Most of the cases cited in support of the order make against it; and there is a material difference between the case put by HOLT, in *Suddlecomb v. Burwash*, and this case, for the case he puts is of a substantive declaration, "*that it has appeared, &c.*" and so probably the order ran in the case there referred to, of *Rex v. Darnal*; but, here, the words "*it hath appeared to us*," are coupled with the evidence [1], and do not seem to differ, in meaning, from "*we do believe*," in *Stallinburgh v. Haxhay*, where the reason

[664]

(c) E. 3 Geo. 2. 2 Sess. Ca. 92.
Bott. 347. 3 Burn, 475. 13th Ed. Burr.
Sertl. Ca. p. 316.

(d) T. 4 Geo. 1. 3 Burn, 475. 13th
Ed. 1 Sess. Ca. 131.

(e) E. 10 Geo. 1. 3 Burn, loc. cit.

(f) E. 9 W. 3. 1 Salk. 479.

(g) T. 13 W. 3. 1 Salk. 491.

(h) E. 2 Ann.

[1] They are so put in the case of
Suddlecomb v. Burwash.

reason given for quashing the order was, (and which equally applies here,) "that a man may believe a thing on uncertain evidence."

BULLER, *Justice*, having mentioned *Rex v. Gravesend* (a), stated in *Bott*,—where, according to his account of it, there was no adjudication of the birth of the child in the parish but under a "whereas," and the court held that to be sufficient,—the court deferred giving their opinion till there should be an opportunity of enquiring more fully into the circumstances of that case.

Lord MANSFIELD absent.

This day, his Lordship was in court, but not having heard the argument at the bar, the judgment was delivered by WILLES, *Justice*, to the following effect.

WILLES, *Justice*, (after stating the objection, and observing upon the cases of *Rex v. Perkass*, and *Suddlecomb v. Burwash*.)—The case of *Saint Giles's Cripplegate v. Hackney* (b) seems to be more like the present than *Suddlecomb v. Burwash*. In that last case, the *dictum* is as was stated by Mr. Bower; however, the report concludes, by saying "there ought to be a particular averment, &c." and, in *Saint Giles's Cripplegate v. Hackney*, the order runs very much in the same manner as here, viz. "whereas on oath made by the said E. F. it appears that her husband was last legally settled at Hackney;" and that order was quashed, "because there was no judgment of the Justices concerning the last legal settlement, but only the oath of the woman" (c). We have looked into the proceedings in *Rex v. Gravesend*, and we find, that there was an *express* adjudication in that case. We are, therefore, all of opinion, that this order cannot be supported.

Both the orders quashed.

(a) E. 15 Geo. 2. Bott. 104.

(c) Salk. loc. cit.

(b) E. 9 Will. 3. 1 Salk. 478.

BRISTOW against WRIGHT and PUGH, Sheriff of MIDDLESEX.

[665]

Friday,
25th May.

IN last Hilary Term, on Thursday, the 25th of January, In an action *Lee* obtained a rule to shew cause, why the verdict which against the had been found for the plaintiff should not be set aside, and sheriff for a new trial granted, or a nonsuit entered. taking goods without leaving a year's rent, the declaration needs not state all the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.

This was an action on the case, against the defendants as sheriff of Middlesex, on the statute of 8 Ann. c. 14. § 1. [C] for taking the goods of one *Pope* in execution, in a house state all the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.

[C 1] That provision only extends the tenant in possession holds, and not to the immediate landlord of whom to a superior or ground landlord. Mas-

1781.

BRISTOW
against
WRIGHT.

house let from year to year by the plaintiff to *Pope*, without paying or contenting him for a year's rent then due, and of which the defendants, before the removal of the goods, had notice [§ 2].

The declaration stated the demise, as follows:

"The said plaintiff, on, &c. demised, to one *Benjamin Pope*, a certain messuage, &c. to have and to hold unto the said *Benjamin*, from the feast of *St. Michael*, then next following, for and during the term of one year from thence next ensuing, and fully to be compleat and ended, and so, from year to year, for so long as it should please the plaintiff; and the said *Benjamin*, yielding and paying, therefore, yearly and every year during the said term, unto the plaintiff, the yearly rent or sum of, &c. by four even and equal quarterly payments; to wit, at the Feast of, &c."

The principal witness called on the part of the plaintiff, was *Pope* himself; who proved, that the plaintiff let the house to him, by parol, for a year, and that there was no stipulation about any time or times for the payment of the rent.

It was contended, at the trial, (which came on before Lord MANSFIELD, at the Sittings for *Middlesex*.) that, as the plaintiff had laid a demise with a reservation of rent payable quarterly, he was bound to prove it exactly as laid; and that, having failed in that proof, he ought to be nonsuited. His Lordship over-ruled the objection, being then of opinion, that enough of the demise as laid had been proved to entitle the plaintiff to his action. The present rule was moved for, on the ground of a misdirection.

[666]

On *Thursday*, the 3d of *May*, the *Attorney General*, and *Dunning*, shewed cause, and urged, that the contract was not the gift of the action; the material part was, that a year's rent was in arrear, and that having been proved, the plaintiff had shewn enough to entitle himself to a verdict.

Wood, on the other side, insisted, that, as the plaintiff had set forth the particulars of the contract, he was bound to prove them as laid; and, for this, he cited;—An *Anonymous Case* in Lord *Raymond*, where, a promise being laid, "to deliver good merchandiseable wheat," and the evidence being of a promise to deliver "good second sort of wheat," Lord *HOLT* held the variance to be fatal, and nonsuited the plaintiff (a);—*The King v. Nudigate* (b), where, upon a traverse of an office found, the issue being, whether *J. S.* devised "to *J. N.* and his heirs" or not, and the jury

ter *Benner's case*, *B. R. M.* 1 *Geo.* 2. 2 *Stra.* 787.

[§ 2] It should seem, in such a case as the present, that the court, on motion, would make a rule on the sheriff to pay the year's rent to the

landlord. *Darling v. Hill*, *B. R. E.* 9 *Geo.* 2. *Ca. Temp. Hardw.* 255.

(a) *Bedford Assizes*, 12 *W.* 3. 1 *Ld. Raym.* 735.

(b) *B. R. E.* 6 *Car.* 1. *Sir W. Jones*, 224.

jury having found that "J. S." devised "to A. for years, remainder to J. N. in fee," the court adjudged "*quod non*" "deviseavit modo et formâ;—*Sands and Tash v. Ledger* (c), where, in an action of debt for rent, the plaintiffs declared on a demise, "for 15l. rent per annum," under a power "to make leases for twenty-one years," and the evidence being of a demise "for 15l. rent per annum, and three fowls," under a power "to make leases for twenty-one years in possession, and not in reversion, rendering the ancient rent, and not dispensable of waste," Lord Holt directed a nonsuit;—And *Savage, qui tam, v. Smith*, which was afterwards stated by Lord MANSFIELD in delivering the judgment of the court (d).

1781.

BRISTOW
against
WRIGHT.

The case stood over till this day.

Lord MANSFIELD, (after stating the case,)—I am very free to own, that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is extremely hard on the party to be turned round, and put to expence, from such mistakes of the counsel or attorney he employs. It is hard also on the profession. It was on this ground that I over-ruled the objection in this case; but I am since convinced, both on the authorities which I am about to mention, and on the reasoning in them, that I was wrong, and that it is better, for the sake of justice, that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are precision and brevity. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover [† 136]. If he states what is impertinent, it is an injury to the other party, and may be struck out and costs allowed, upon motion [† 137]. I remember a case, where, in an action on one covenant, the whole of a very long deed was set forth. The court referred it to the Master, and all was struck out except the covenant on which the action was brought, and costs paid to the amount of 100l. When I say that the plaintiff needs only set forth that part of a deed on which his action is founded, I do not mean to say that even *that* is necessary. He is not bound to set forth the material parts, *in letters and words*. It will be sufficient to state *the substance and legal effect*.

[667]

(c) *Surry Affizes*, 1 Ann. 2 Ld. Raym. 792.

(d) *Infra*, p. 668.

[† 136] *Vide Dundas v. Lord Weymouth*, B. R. M. 18 Geo. 3. Cowp. 665.

[† 137] *Vide Price v. Fletcher*, B. R. H. 18 Geo. 3. Cowp. 727. *Rex v. May*, E. 19 Geo. 3. *supra*, p. 193. *Rex v. Lord Waltham*, T. 25 Geo. 3.

1781.

BRISTOW
against
WRIGHT.

[668]

effect. That is shorter, and not liable to misrecital, and literal mistakes. Here, that method might have been followed. It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage, (which might have been struck out on motion,) and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the Master, on a reference to him, would strike out, (irrelevant covenants for instance,) that will be rejected by the court, and need not be proved. But, if the very ground of the action is mis-stated, as where you undertake to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal. For then, the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. This will reconcile all the cases. In the present instance, the plaintiff undertakes to state the lease, and states it falsely. There are many authorities which go to prove this distinction. I will mention three, (which are very strong,) where matter, which it was unnecessary to set forth, being stated, and not proved, the variance was held to be fatal. The first is the case of *Cudlip v. Rundle* (a). There,—in an action by a lessor against his tenant, for negligently keeping his fire, by means whereof the house was consumed,—a demise to the defendant for seven years was stated in the declaration; the defendant pleaded, that the plaintiff did not demise *modo et formâ*; and issue being joined, it appeared, on the finding by the jury in a special verdict, to be a lease at will. The court agreed, that the action would have lain against the defendant as tenant at will; but, as the plaintiff had stated him to be a lessee for years, and had proved him tenant at will, the variance was held to be fatal, and there was judgment for the defendant. The next is the case of *Savage, qui tam, v. Smith*, in the *Common Pleas* (b). That was an action of debt against a sheriff's officer, by an informer. The declaration stated a judgment, and a *fieri facias* upon that judgment. The *fieri facias* was given in evidence, but not the judgment, and the court held, that, though it might be unnecessary to aver the judgment, yet, having been averred, it ought to be proved; and my Lord Chief Justice DE GREY expressly went upon the distinction between immaterial and impertinent averments, and said, that the former must be proved, because relative to the point in question [1]. The third case

(a) *B. R. T. 2 W. & M. Carth. 202.*(b) *T. 16 Geo. 3. 2 Blackst. 1101.*

[1] By a mistake of the press, the

word "material" is printed instead of "immaterial," in the report of this case in 2 *Blackst. 1104*. "Immaterial" certainly

is *Shute v. Hornsey* in this court (c). That was an action for double rent on the statute (d). The declaration stated a lease for three years; but, on the evidence, it appeared, that the lease for three years was void, under the statute of frauds; and that the defendant was only tenant from year to year. This was sufficient for the purpose of the action; but a lease for three years having been laid, and not proved, the plaintiff was nonsuited; and a rule for setting aside the nonsuit having been obtained, it was, upon the argument of the case, discharged. These authorities are in point to the doctrine I have laid down. But perhaps, notwithstanding the weight of the cases, if that doctrine were highly detrimental, and the setting it right would be attended with no mischief, as it is only a mode of practice, it might deserve consideration. But I believe it stands right, and upon the best footing; for it may prevent the stuffing of declarations with prolix unnecessary matter, because of the danger of failing in the proof; and may lead pleaders to confine themselves to state the legal effect. We are all of opinion that the verdict should be set aside, and judgment of nonsuit entered.

1781.

BRISTOW
against
WRIGHT.

[669]

The rule made absolute [† 137].

certainly was the word used by *De Grey*, Chief Justice, as appears, not only from what is here said by Lord MANSFIELD, but also from a very accurate manuscript note I have seen of *Savage v. Smith*, and indeed from the context in *Blackstone's* own report.

(c) *E. 19 Geo. 3.*(d) *11 Geo. 2. c. 19. § 18.*

[† 138] *Vide Carlisle v. Trears*, *B. R. M. 18 Geo. 3. Corp. 671.* *Vide*, also, *Moore v. Musgrave*, *Hob. 18.* but corrected in *1 Roll. Abr. 850. pl. 11. Pope v. Skinner*, *Cam. Scacc. T. 12 Jac. 1. Hob. 72. & Roberts v. Herbert*, *C. B. M. 12 Car. 2. 1 Sid. 5. Wyvill v. Shepherd*, *C. B. H. 29 Geo. 3. H. Bl. 162. Barbe v. Parker*, *C. B. M. 30 Geo. 3. H. Bl. 284.* which three last cases are instances of variations not held fatal, and it now seems settled, that the strictness re-

quired in this case of *Bristow v. Wright*, holds only in cases of records and written contracts. *Vide King v. Pipet*, *B. R. E. 26 Geo. 3. 1 Term Rep. 235.* and *Gwinnet v. Philips*, *B. R. E. 30 Geo. 3. 3 Term Rep. 643.* In *Baker v. Edmunds*, *B. R. M. 23 Car. 1.* it was resolved, "that, in an action upon a contract itself, if the party mistake the sum agreed on, he fails in his action; but if he bring his action upon the promise in law, which arises from the debt," (the common case of *indebitatus assumpsit*), "there, though he mistake in the sum, he shall recover." *Alcyn 28, 29. in Smith v. Hickson*, *B. R. T. 7 Geo. 2.* Lord Hardwicke says, "in contracts it is necessary to prove all the charges in the declaration exactly in the manner they are laid." *Cases Temp. Lord Hardw. 54, 55.*

PAGET against WHEATE.

Friday,
25th May.

ACTION of debt on a bond, executed at *Westminster*, By the insolvent debtors' act of 18 Geo. 250l. 3. c. 51. the insolvent person is discharged as to bonds executed before the day in the act, but not payable till after the day.

1781.

PAGET
against
WHEATE.

250*l.* The defendant, by his *plea*, confesses the debt; "But,—in pursuance of an act of parliament, &c. (18 Geo. 3. c. 52.) in discharge of his person from the execution of the judgment to be obtained against him in that behalf by the plaintiff, according to the form and direction of that act,—says, that he was beyond the seas in foreign parts, on the 10th of *March* 1778, and was duly discharged, according to the said act, at, &c. on the 3d of *November* 1778; and further says, that the said debt for which this action is brought, was contracted before the 10th day of *March* 1778, to wit, &c. wherefore he prays judgment, and that his person may be discharged from the execution of the judgment to be obtained against him by the plaintiff in this action, according to the form of the said act, &c."—*Replication*; That the bond was made at the time and place in the declaration mentioned: Then sets forth the condition; which was, to pay 125*l.* with lawful interest on the 21st of *November* 1778: Then avers, that, after the making the bond, and after the said 10th of *March* 1778, and before suing out the original writ, to wit, on the said 21st of *November* 1778, in the condition mentioned, the said sum of 125*l.* first became due, according to the tenor and effect of the said condition, and not at any time before: That the defendant had not paid it then, nor afterwards, but that it still remained unpaid; by reason of which said premises, the bond became forfeited, and the said debt and cause of action thereby and thereupon accrued, after the said 10th of *March* 1778.—*General Demurrer*.

[670]

The question in this case turned upon the construction of the words of the act of parliament, which are: "That, if any action is brought against a person who has taken the benefit thereof, for any debt due before, &c." he may plead, in discharge of his person, "that such debt was contracted or due before, &c. (a)."

The case was argued, on *Friday*, the 11th of *May*, by *Wood*, in support of the demurrer, and by *Law*, for the plaintiff.

Wood admitted, that the particular clause in the act on which the question here more immediately turned, and which directs the manner of pleading, is not very accurately penned; but he contended, that, if the whole act was taken together, it would be manifest that it was the intention of the legislature, that debts under the circumstances in this case, should be discharged by the act. This, he said, appeared clearly from the 37th section, which provides, that no person discharged by the act shall be imprisoned for any debt, bond, &c. contracted, incurred, occasioned, owing, or growing due, before, &c. and that, if arrested,

(a) 18 Geo. 3. c. 52. § 40.

arrested, such person shall be released by any judge of the court out of which the process issued, or by two Justices of peace, &c.

Law, on the other side, insisted, that insolvent acts ought not to be construed with greater latitude in respect to the insolvent, than the bankrupt laws in respect of the bankrupt; and that a bond, made before bankruptcy, but not due till after, was not proveable under a commission, nor discharged by the certificate, till a statute was expressly made for that purpose (*b*). He observed that the 37th section of the insolvent act only applies to the case of *prisoners*, not of *fugitives* like this defendant[1]; and contended that, till the day of payment, in the case of a bond, the debt does not exist.

Lord MANSFIELD said, he thought this very point had been determined upon some former insolvent act, and desired the case might stand over, to give an opportunity of enquiring if there had not been a decision upon it.

And, now his Lordship mentioned, that the very same question had occurred in a case of *Workman v. Leake*, and had been determined, *H. 14 Geo. 3. (c) [† 139]*; that by a note he had seen of that case, it appeared, that the court had held, that a debt due by a promissory note, though not payable till after the day in the act, yet was *debitum in presenti*, and that, as such, it was discharged; differing from a debt only payable on a contingency, which would not be discharged, unless the contingency had happened before the day; and that he had then mentioned, that he and the other Judges had been reminded of various instances where they had discharged from arrests, under similar circumstances to those of the case then before them.

Judgment for the defendant.

(*b*) 7 Geo. 1. c. 31. § 1, 2.

[1] By § 41. the statute may be pleaded to action on debts of *prisoners*, if contracted before the 28th of January 1778, and of *fugitives*, if before the 10th of March 1778. Yet by § 37. provision is only made for

the summary discharge from arrests for debts contracted before the 28th of January 1778. This must have been a slip in drawing the act.

(*c*) 10th Feb.

[† 139] That case of *Workman v. Leake* has been since reported, *Cowp. 22.*

1781.

PAGET
against
WHEATE.

[671]

BAILEY against WILKINSON.

Saturday,
26th May.

UPON a rule to shew cause, why there should not be judgment as in case of a nonsuit against the plaintiff, the cause shewn was, that the defendant had become insolvent since the action brought.

BULLER *Justice*, said, he had known the rule for judgment as in case of a nonsuit, refused on this ground, in former

The insolvency of the defendant having happened since the action brought, is good cause against judgment as in case of a nonsuit.

VOL. II.

R

former

1781.

BAILEY
against
WILKIN-
SON

former instances; and that it would be extremely hard, if a party should be obliged to proceed, and put himself to expence, without a possibility of recovering either debt or costs.

Dayrell, for the plaintiff.—*Sutton*, for the defendant.

The rule discharged.

TARLTON *against* FISHER and Others.

Saturday
26th May.

A sheriff or his officer is not liable to an action of false imprisonment, for arresting a certified bankrupt, a peer, a discharged insolvent, or a person who took advantage of the statute of 20 Geo. 3. c. 64. made on the occasion of the prisons in London being burnt by the rioters, although the party, in such cases, is privileged from arrests.

* [672]

THIS was an action of trespass, and false imprisonment.

—The declaration contained two counts; 1. For imprisoning the plaintiff on the 27th of November 1780, at Bath, in * *Somersetshire*, and detaining him in prison three days; 2. For imprisoning him at the same place, on the 29th of December 1780, and detaining him eleven days.

—The defendants *pleaded*, 1. Not guilty, upon which *issue* was joined; 2. To the first count, a justification, as sheriff's officers, under a writ of attachment out of the court of *Exchequer*, directed to the sheriff, and a warrant from him; 3. To the second count, a like justification, under a precept in the nature of a writ of *capias ad satisfaciendum* from the court of requests in the city of Bath, directed to them as officers of that court.—The plaintiff *replied*; 1. To the justification pleaded in bar of the first count, that, before the time when, &c. in the first count mentioned, and before the making of the statute of 20 Geo. 3. c. 64. viz. on the 20th of November 1779, he was arrested, under a writ of *latitat*, directed to the sheriff of *Somersetshire*; that, afterwards, before the time in the said count mentioned, and before the making of the act, viz. on the 3d of February 1780, he gave special bail to the action, and, afterwards, before the time in the said count mentioned, and after the making of the act, and before the prisons of the *King's Bench* and the *Fleet*, respectively, were repaired, or other prison or prisons substituted in lieu thereof, respectively, and notice thereof given in the *London Gazette*, viz. on the 25th of August 1780, he surrendered himself in discharge of his bail, before Lord MANSFIELD, and was, thereupon, committed to the custody of the marshal; that the tipstaff then tendered him to the said marshal; and that, in all things, he conformed to the rules and directions by the said act of parliament prescribed, concerning such prisoners who had surrendered in the manner in the said act mentioned; by reason whereof, and by force of the said act, at the time in the said count mentioned, and from thenceforth he had been, and still was, in the custody of the marshal, and was not liable to be arrested by virtue of the writ in the said plea mentioned; of all which premises the

said

said defendants, at the time in the said count mentioned, had notice; Then a similar replication to the special plea in bar of the second count; and 3. A new assignment on the first count, of another assault and false imprisonment.—To the replication on the first count the defendants rejoined, that the plaintiff did not conform to the rules and directions by the act of parliament prescribed; on which rejoinder issue was joined; To the replication on the second count, they rejoined, that the plaintiff was not committed by Lord MANSFIELD to the custody of the marshal in discharge of his bail; on which issue was also joined; and, to the new assignment, they pleaded the general issue.

1781.

TARLTON
against
FISHER.

[673]

A general verdict having been taken at the Assizes, for the plaintiff, by mistake, *Morris* obtained a rule to shew cause, why the *Posse* should not be amended, and made agreeable to the notes of the Judge who tried the cause, by entering the verdict for the defendants on all the issues, except on so much of the general issue as related to the trespass mentioned in the first count, and on the issue joined on the justification pleaded in bar to the first count; and why the judgment should not be arrested.

The court having heard the counsel upon the subject of the amendments, and perused the judge's notes [† 140], that part of the rule was made absolute; and then the question on arresting the judgment was argued, by *Wood*, for the plaintiff, and *Morris* and *Batt*, for the defendants.

The question turned upon the construction of the following words in the statute of 20 Geo. 3. c. 64. § 2.

“And shall not be liable to be arrested by virtue of any civil process out of any court; and, in case they have been, or shall be, so arrested, shall be discharged therefrom [1].”

For the defendant, it was argued, that the sheriff and his officers were bound to execute the process directed to them, and to keep the person arrested till they were satisfied of the truth of the surrender, and compliance with the regulations of the statute. It could not be the meaning of the legislature, that the sheriff should take upon himself the truth of those circumstances, upon the mere assertion of the party, or give implicit credit to the marshal's certificate.

[† 140] *Vide Eddowes v. Hopkins*, E. 20 Geo. 3. *supra*, p. 376. *Grant v. Affle*, T. 21 Geo. 3. *infra*, p. 722.

[1] This section of the statute only applies to persons who had been actually in custody, and set at liberty by the rioters. By § 6. the same sort of surrender as had by § 2. been prescribed as to them, is prescribed for persons under circumstances like those stated by this plaintiff in his replication; and

it says, that, on their complying with the rules and directions prescribed by § 2. the bail shall be discharged, and the defendants deemed and taken to be in actual custody; but does not go on to add, “and shall not be liable to be arrested.” This difference between the two clauses was not taken notice of on the argument of this case. I presume § 6. was considered as adopting, by implication, all the provisions of § 2.

1781.

TARLTON
against
FISHER.

oate [2]. The statute does not operate as a *superfedeas*, but, if a party will take advantage of it, the regular method is to apply to the court, where he may make *affidavit* of the truth of the facts. The sheriff has no authority to put him to his oath. *Feme covert*s are, every day, discharged from arrests; but no action of trespass was ever brought in such cases; nor for arresting persons entitled to privilege. If, in any such case, an action can be maintained, it must be *case*, not *trespass*, and that can only be against the party, not against the sheriff or officer; *Salmon v. Percival* (a), *Parsons v. Lloyd* (b), *Cameron v. Lightfoot* (c).

On the other side, it was said, that the act had pointed out the means by which those who had surrendered might be known upon application to the marshal, as they were obliged to give him an account of their place of abode in writing (d), and the replication, in this case, expressly charged, that the defendants had notice of the surrender and discharge, viz. "of all which premises, &c." In *Cameron v. Lightfoot*, the ground of the decision was, that the protection of a witness, or party, *eundo et redeundo*, is the privilege of the court, not of the person himself. It would have been a good return to the writ, that the party had conformed to the act, and so he could not arrest him.

LORD MANSFIELD,—This is a direct action of trespass, *quare vi et armis*, and not on the case; and there is this distinction between them, which always ought to be attended to: In *trespass*, innocence of intention is no excuse; in *case*, the whole turns upon it; malice, or the *quo anima*, is the very gist of the action. In this case, the notice is immaterial: for it is contended, that the arrest was illegal; and the question singly is, whether the sheriff must abstain, at his peril, from arresting any man who has taken advantage of the act. It is argued as if the discharge under the act operated as a *superfedeas*. But the doubt will be, not on the act, but on the party; whether he is within it. The sheriff must determine that question, he must decide whether the surrender was fraudulent, before he discharges. There is no doubt but there was a fraud upon the act in this case. The plaintiff, an inhabitant of Bath, gives special bail before the riots, and then comes up to London to free his bail and himself. Could the legislature mean, that

[2] A practice had prevailed since the act passed for the marshal to deliver a certificate of the surrender and compliance with the directions of the act, to the party; but this is not prescribed by the statute. By the insolvent acts, the party is to be released from arrests, by a judge, or two justices, upon shewing the copy of the order for his

discharge, 18 Geo. 3. c. 52. § 37. The marshal's certificate was probably thought of, from analogy to the copy of the order in that case.

(a) B. R. T. 6 Car. 1. Cro. Car. 196.

(b) C. B. M. 13 Geo. 3. 3 Wils. 341.

(c) C. B. E. 18 Geo. 3. 2 Blackf. 1190.

(d) § 2.

that every bailiff should judge, at his peril, whether the surrender and discharge were fraudulent? whether the act had been complied with? It necessarily passed very precipitately, from the urgency of the circumstances. There is no direction how the discharge is to be, which in the statutes relative to bankrupts and insolvents, is explicitly pointed out; but the expressions, "shall not be liable to be arrested," and "shall be discharged," from the nature of the thing, mean, "shall be discharged by proper authority." The sheriff is not bound not to arrest. If he chuses to take the truth of the facts upon him, and not arrest the party, he may, and the surrender and compliance with the act will be a good return [† 141]; but he will be answerable. The case of *Cameron v. Lightfoot*, is material. It is, there, said, that privilege will not be allowed but in fair cases; and even then, trespass will not lie for the arrest. I am clear, that an action of trespass does not lie in this case, against the officers. Whether, if the defendants had done any thing oppressive, with full notice of all the circumstances, an action on the case might be maintained, would be another question.

WILLES, *Justice*,—I own I have great doubts in this case. There are two provisions in the act; 1. That the party shall not be liable to be arrested; 2. That, if he is arrested, he shall be discharged. Under the first, I think trespass would not lie against an officer who ignorantly arrests a party who has taken the benefit of the act. But *that* is not the case here; for it is stated, that the defendants had notice at the time of the arrest. The party has no way of shewing, that he is not liable, but by producing the certificate of the marshal, which the sheriff and his officers are bound to take notice of, in the same manner as in the case of a *superfedeas*. Under the second provision, I think trespass might lie, if the party were detained longer than was necessary for making the proper enquiries; but, here, the plaintiff was only detained three days, which would be no more than reasonable time. But I lay my finger on the first part of the clause, which I think decisive, that the arrest was illegal; and there is a clear difference between illegal arrests, and arrests against privilege. Unless the certificate has the effect of a *superfedeas*, the first part of the clause is nugatory.

ASHHURST, *Justice*,—I think this action is not maintainable. A sheriff is bound to execute process issuing out of a court of competent jurisdiction; and, though there be no cause of action, or the process is erroneous, he is not responsible. The plaintiff himself, in such cases, is only liable to an action on the case for maliciously holding to bail.

[† 141] Such a return was held good in a case of *Inge v. Herrick*, B. R. M. 22 Geo. 3.

1781.

TARLTON
against
FISHER.

[676]

1781.

TARLTON
against
FISHER.

bail. But it is unnecessary, here, to go into the question of what remedy there might be against the party. It would be extremely hard, indeed, upon a sheriff, or his officers, if they were bound to enquire into the truth of the exemption, and determine upon it at their peril. The notice alleged in this replication is mere form. But, supposing there was actual notice, were the defendants bound to give credit to the allegation of the party? Even if a certificate was shewn, I should doubt whether the officers would have been justified in discharging him. It is a plaintiff's business to take care how he takes out his writ. If he deliver it to the sheriff, he takes all upon himself. He may know, and take upon himself to prove, that the surrender and other proceedings were fraudulent; and shall the officer discharge the party on the production of a certificate, when the plaintiff has it in his power, perhaps, to shew fraud in obtaining it? If there were fraud, what defence could be set up to an action for an escape? The act could never mean, that every sheriff should send to *London* to enquire who had surrendered.

BULLER, *Justice*.—This seems to me a very clear case. I do not feel the weight of the argument on the first part of the clause of the act. As to the discharge, express words would have been used if it had been meant to vest new powers in the sheriff. The meaning must have been, to vest the power of discharge where, in other cases, it was vested before, viz. in the court out of which the process issued; or, in vacation, in one of the Judges. That satisfies the words of the act. In cases of bankrupts, or insolvents, what is done? Hundreds have been arrested, but there never was an instance of an action against the sheriff or his officers in such cases. The practice, in the case of bankrupts, is, to apply to a Judge, and verify the certificate by *affidavit* (a). How could the sheriff ascertain that the certificate was signed by the commissioners? He cannot administer an oath. In the case of insolvent debtors, the provisions for this discharge are somewhat different in words, but are, in substance, I think, the same. The party, there, is to be discharged; not by the sheriff, but by the order of a Judge, (or two Justices of the peace (b),) and there is, in the insolvent acts, similar words to those of the first part of the clause in the statute now under consideration; for it is enacted, "that no person to be discharged by the act shall be imprisoned, &c. (c);" so that, if this is to be considered as a positive injunction upon sheriffs not to execute process but at their peril, false imprisonment would lie in every case where an insolvent has been discharged by a Judge's order.

[677]

(a) *V. de* 5 Geo. 2, c. 30. § 13.(c) *Ibid.*

(b) 18 Geo. 3, c. 52. § 37.

order. The practice under the act in question is too recent to have much weight; but, as far as it goes, it is against the idea that sheriffs are to take upon themselves to discharge. Frequent applications have been made to Judges to discharge persons who had the marshal's certificate, and they have exercised their discretion in deciding whether the party was entitled to his discharge. I myself have often refused to do it, on the ground of collusion; and the court has declared, in particular, that, where the defendant has come from a remote county to surrender to the marshal, in order to defeat his *bonâ fide* creditors, the act will afford him no protection. The general law, as to sheriffs, is, that if a sheriff has acted in obedience to the mandate of the court, he is excused. If he arrest a peer, the writ is erroneous, yet he is not a trespasser for executing it. In trespass, the defendant must shew an excuse. Have the defendants done so in this case? Yes, for the mandate of the court was compulsory on them. The original plaintiff would not be liable to an action of trespass till the writ is superseded, for, till then, it is a justification: After a *superfedeas*, trespass will lie against the party; but still not against the sheriff. I take this to have been settled over and over again, and the inconvenience would be very great if the law were otherwise.

The rule made absolute.

1781.

TARLTON
against
FISHER.

*[678

BUTCHER *against* GREEN.

Saturday,
26th May.

THIS was an action on the case, in which there was one count *in trover*, and another *for words* [1].—When there are issues joined on several counts, and on some a verdict for the plaintiff, and on others for the defendant, the defendant shall not have costs on that part of the record on which the verdict is found for him.

Pleas; “not * guilty,” to the first count; and a *justification* to the second.—Verdict for the plaintiff on the count for *trover*, and for the defendant on the other. The *Attorney General* had obtained a rule to shew cause (a) why the Master should not tax the defendant his costs relative to the pleadings and proceedings on the second issue which was found for the defendant, and why what should be allowed to him on such taxation should not be deducted out of what should be allowed to the plaintiff on the first issue, in case the same should exceed the costs allowed to the defendant.

Wheeler

[1] *Vide Dickson v. Clifton*, C. B. M. 7 Geo. 3. 2 Wilf. 319. where it was determined, that case on the custom of the realm, against a carrier, and trover, may be joined in one action, contrary to the old case of *Matthews v. H. pkin.*

B. R. E. 17 Car. 2. 1 Sid. 224. and that the true criterion to know what counts can be joined, is, not whether they require the same plea, but whether there is the same judgment in both.

(a) On Monday, the 7th of May.

1781.

BUTCHER
against
GREEN.

Wheeler now shewed cause, and cited *Astley v. Young* (b). *BULLER, Justice*, said, the practice of this court had been uniform not to allow the defendant costs in cases of this sort. They differed, he said, from cases where different issues are joined on different pleas: for, in those cases, the defendant is allowed his costs on the issues found for him [2].

The rule discharged [3].

(b) *B. R. T.* 1 *Geo.* 3. 2 *Burr.* 1232.

[2] *Vide Cooke v. Sayer, B. R. H.* 32 *Geo.* 2. 2 *Burr.* 753. where it appears that this point was not then settled. If the issue is found for the plaintiff on a special plea, or there is judgment for him on a demurrer to such plea, he is to have costs by the express provision of 4 *Ann. c.* 16. § 5. *Quere*, If that clause extends to cases where there is judgment for the plaintiff, on a demurrer to a special plea before the trial on the general issue, and, afterwards, a verdict for the defendant on the general issue. There is no exception of that case, in the statute. Yet, upon principle, and the reasoning of the court, in *Cooke v. Sayer*, the plaintiff ought not to have any costs in

such a case, because it appears, ultimately, that he had no cause of action.

[3] If there are several issues on several special pleas of justification, and on the general plea of not guilty, all are found for the plaintiff, except one of the special justifications, which is found for the defendant, but afterwards held insufficient in point of law, so that the plaintiff has judgment, the plaintiff shall not have the costs on such issue found for the defendant. This was determined in *Kirk v. Norwill et al. B. R. E.* 26 *Geo.* 3. 1 *T. R.* 266, 267.

[3] *S. P. Bridges v. Raymond, C. B. H.* 12 *Geo.* 3. 2 *Blackst.* 800. and *Norris v. Waldron, C. B. E.* 18 *Geo.* 3. 2 *Blackst.* 1199.

The End of EASTER TERM, 21 GEORGE III.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Twenty-first Year of the Reign of GEORGE III.

RUSHTON against ASPINALL.

1781.

Friday,
15th June.

THIS case came on upon a writ of error from the court of the county palatine of *Lancaster*. It was an action of *assumpsit*. The first count in the declaration,—after stating, a bill of exchange drawn by one *Billinge* on one *Meyer*, dated the 27th of *November* 1778, and payable to one *Jones*, or order, three months after date; that *Jones* had indorsed it to *Rushton*; and *Rushton* to *Aspinall*;—proceeded as follows;—"Which said bill of exchange so made, subscribed, and indorsed as aforesaid, afterwards, to wit on the same day and year aforesaid, (*viz.* the day of the date of the bill,) at *Manchester* aforesaid, was shewn and presented to the said *Peter Meyer*, for his acceptance thereof, and the said *Peter Meyer*, according to the usage and custom of merchants aforesaid, did then and there accept the same, and promise to pay the said sum of 22*l.* 10*s.* therein mentioned, according to the tenor and effect of the said bill of exchange, and the indorsements thereupon so made as aforesaid, yet the said *Peter Meyer*, although afterwards, to wit, the same day and year aforesaid, at *Manchester* aforesaid, requested to pay the said sum of money in the said bill specified, according to the tenor and effect thereof, and of his acceptance thereof so made as aforesaid, altogether neglected and refused, and still doth neglect and refuse, to pay the same; of all which premises the said *John Jones*,

In an action against the indorser of a bill of exchange, if the plaintiff do not allege a demand, and refusal by the acceptor, on the day when the note was payable, it is error, and not cured by verdict.—In like manner it is error, and not cured by verdict, if he do not allege notice to the defendant of the refusal by the acceptor.

[680]

1781.
 RUSHTON
 against
 ASPINALL.

" Jones, George Bilinge, and Peter Meyer, respectively, the same day and year aforesaid, at Manchester aforesaid, in the county aforesaid, had notice, and, by reason thereof, and according to the said usage and custom of merchants, the said Thomas Rushton became liable to pay to the said Joseph Aspinall, the said sum of money in the said bill of exchange contained, according to the tenor and effect thereof, and of the several indorsements so made thereon as aforesaid; and, being so liable, the said Thomas, afterwards, to wit, the same day and year last mentioned, at Manchester aforesaid, in the county aforesaid, in consideration thereof, undertook, and to the said Joseph then and there faithfully promised, to pay to him the said sum of money, in the said bill of exchange contained, according to the tenor and effect thereof, and according to the several indorsements made thereon as aforesaid."

The second count was for another bill for 60*l.* drawn, indorsed, and accepted, by the same parties; and was framed in the same manner with the first.

The last count, which was upon an *insimul computasset*, concluded, that the said Thomas was found in arrear, and indebted to the said Joseph, in the further sum of, &c. "and thereupon, being so found in arrear and indebted as aforesaid, the said Thomas, in consideration thereof, afterwards, to wit, &c. undertook, and to the said THOMAS, then and there faithfully promised, to pay to him the said last sum, when he should be afterwards thereto requested."

There was a general verdict for the plaintiff, and, judgment being entered, the record was removed into this court, and the plaintiff in error assigned several errors on the different counts, but which contained only three objections; two to the two first counts, and one to the third: *viz.* 1. That it appeared by the record, that the bill was made on the 27th of November 1778, payable three months after date, and that the payment was demanded of Meyer on the very same 27th of November; whereas, according to the tenor of the bill, and the custom of merchants, it was not payable, nor the payment demandable of Meyer, until the expiration of three months after the date thereof: 2. That it did not appear that Rushton, to whom the bill was indorsed, and who indorsed it to Aspinall, had any notice of the refusal of Meyer to pay the money in the bill mentioned, when the same was and became due, and had been demanded of him, "without which notice, the said Thomas Rushton, as an indorser of the said bill of exchange, was not liable, by the law of this kingdom, and according to the usage and custom of merchants aforesaid, to the payment of the money therein men-

"tioned,

"tioned, as such indorser of the same bill:" 3. That, by the record, it appeared, that the promise of the said *Thomas Rushton*, mentioned in the last count, was made to himself the said THOMAS RUSHTON, and not to the said JOSEPH ASPINALL; wherefore the said *Joseph Aspinall* could not have or maintain any action thereof against "the said *Thomas Rushton*."

1781.

RUSHTON
against
ASPINALL.

In the last term, on *Friday*, the 25th of *May*, the case was argued, by *Chambre*, for the plaintiff in error, and *Wood*, for the defendant

Chambre abandoned the objection to the last count, but contended, that the other two were fatal.—1. The contract by the indorser to pay the bill, was not absolute, he said, but conditional, *i. e.* in the event of a demand being made on the acceptor at the time of payment, and his refusal. Such demand, therefore, must be made, in order to render the indorser liable. It was a necessary circumstance to entitle the drawer to an action against him, and a plaintiff must in all cases state a sufficient cause of action in his declaration.—2. In like manner, the indorser is not liable till after he has had notice of a demand having been made upon the drawer and of his refusal. How soon such notice shall be given,—what shall, or shall not, be reasonable time for notice,—is a matter for the consideration of the jury [† 142]; but some notice must be given, and therefore ought to be alleged.

Wood argued, in answer to both objections, that the facts of the demand and notice being circumstances without which the jury could not have found for the plaintiff, they must now be presumed to have been proved, and that the omission to allege them in the declaration could not be taken advantage of after verdict. For this he cited the case of *Hitchin v. Stevens* in *Shower (a)*, where, in an action of debt for rent by the bargainee of a reversion, after a verdict for the plaintiff, it was objected, in arrest of judgment, that the plaintiff had not alleged attornment, without which (as the law then stood) he could have no title; "but a rule was taken and agreed by all the court, that, in any case where any thing is omitted in the declaration, though it be matter of substance, if it be such as without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment [†];" and

[682]

[† 142] *Vide Ruffel v. Langstaffe, M. 21 Geo. 3. supra, p. 514, 515. Note [† 110].*

(a) *B. R. M. 34 Car. 2. 2 Show. 233.*

[†] In *Spiers v. Parker, B. R. H. 26 Geo. 3. 1 Term Rep. 141. 145. Buller, J. said, "After verdict nothing*

"is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated. That is the case where a feoffment is pleaded without livery, for a livery is always implied, because it makes a necessary part of a feoffment."

1781.

RUSHTON
against
ASPINALL.

and thereupon, after solemn debate, judgment was given for the plaintiff. With regard to the *first* objection in particular, he contended, that the allegation, under a *videlicet*, that the demand of payment was made on the 27th of November, might be rejected as surplusage. This was no more than appeared to have been done in a case of *Sorrel v. Lewen*, reported by *Keeble* (a). There, in an action of *indebitatus assumpsit*, the promise was laid on the 1st of January, 26 Car. 2. which was a duty not yet come, and, after verdict, it was held to be cured, because the verdict must have been found on evidence of a promise before the action, and a duty before the promise. And, as to the *second* objection in this case, although there was no allegation of notice to the indorser, yet it was stated, that he *promised* to pay, after the acceptor had refused, which he could not be supposed to have done without a knowledge of the refusal by the acceptor.

Chambre, in reply, observed, that the rule mentioned by *Wood* could not extend so far as he would carry it, otherwise a writ of error could never be supported, in any case, after verdict. The court would intend, that facts imperfectly stated had been completely proved, but they never could presume, that a material fact, which was not at all stated, had been proved. The first objection would not be removed by rejecting the words stating the demand to have been on the day when the bill was drawn, for still, the declaration would remain without an allegation of a demand at the time when the bill became due. As to the *promise by Rushton*, that is only considered as inference of law, and no such inference arises, unless it appears by the preceding part of the declaration that he was liable; or, if it is taken as an actual promise, yet it might have been made without notice of the refusal by the acceptor; and, if it was, no action could be maintained upon it, because, without such notice, there would be no consideration.

The court were prepared to have given judgment the last day of *Easter Term*, (Monday, the 28th of May,) but neither of the counsel in the cause being present when Lord MANSFIELD was obliged to go to the House of Lords, the cause stood over till this day.

[683]

Lord MANSFIELD, — The two objections insisted upon, are, 1. That the declaration does not allege a demand on the acceptor. 2. That it does not state notice to the defendant, of the acceptor's refusal to pay. The answer was, that, after verdict, it must be presumed, that those facts were proved at the trial: and our wishes strongly inclined us to support the judgment, if we could. But, on looking into the cases, we find the rule to be, that, where

(a) — B. R. M. 26 Car. 2. 3 Keb. 354.

where the plaintiff has stated his title, or ground of action defectively or inaccurately,—because, to entitle him to recover, all *circumstances* necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,—it is a fair presumption, after a verdict, that they were proved [§]; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption. The case cited from *Shower* comes within this distinction; for the grant of the reversion was stated, which could not have taken effect without attornment, and therefore, *that* being a necessary ceremony, it was presumed to have been proved. But, in the present case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice of the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were to be presumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn. I see, in a note of a case [1] in this court, in *Easter Term*, 18 Geo. 3. I am stated to have said; “A verdict will not mend the matter where the *gist* of the case is not laid in the declaration, but it will cure ambiguity;” and there is a strong case in print of an action for keeping a malicious bull (*a*), where, the *scienter* having been omitted in the declaration, it was held bad after verdict. Therefore we are all of opinion, that there should be judgment for the plaintiff in error.

1781.

RUSHTON
against
ASPINALL.

[684]

The judgment reversed [† 144].

[§] *S. P. Ram v. Hughes, Dom. Proc.* 14 May 1778, 7 *Br. Parl. Cases*, 550. & *MSS.*

[1] *Avery v. Hoole*. It was an action against an unqualified person for using a gun. The declaration stated, that the defendant used a gun, *being an engine for the destruction of game*. In arrest of judgment it was objected, that it was not averred that the defendant used the gun for the destruction of game, but the court over-ruled the objection. Lord Mansfield observed, that, according to one way of pointing, the offence was sufficiently charged, and that such an ambiguity, though it might be a good cause of special demur-

rer, or an objection to a conviction, (as was held in a case of *Rex v. Hunt*, *E. 15. Geo. 3.*) was cured by verdict [† 143].

(a) *Buxendin v. Sharp*, *C. B. E. 8 W. 3.* 2 *Salk.* 662. 3, *Salk.* 12.

[† 144] In *Salmons v. Staveland*, *B. R. M.* 24 *Geo. 3.* which was an action on a foreign bill of exchange, the court held, on the authority of the precedent in *Dunster v. Pierce*, *Lill. Entr.* 55. that the omitting to allege, in the declaration, a protest of the bill, is only matter of form, and cannot be taken advantage of on a general demurrer.—*Morgan* for the plaintiff.—*Bower* for the defendant.

[† 143] *Avery v. Hoole* has been since reported, *Cowp.* 825.

1781.

Tuesday,
19th June.

Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part,

JONES and Another, Assignees of GARDINER,
a Bankrupt, against BARKLEY.

THIS was a special action on the case, for non-performance of an agreement.

The first count of the *declaration*,—after reciting that the plaintiffs, as assignees of GARDINER, were entitled to the equity of redemption of 1490*l.* Bank stock, which was in mortgage to one Lane for securing a sum of money lent by him to the bankrupt, and that the defendant was desirous that this equity of redemption should be assigned to Lane by the plaintiffs, and that they should execute, to Lane, a general release of all claims and demands which they, as assignees, had upon him,—stated the agreement to have been,—“That, on Gardiner’s having his certificate confirmed by the Lord Chancellor, and the plaintiffs assigning to Lane, or any person he should appoint, so far as in them lay, the equity of redemption of the said capital stock mortgaged to the said Lane, and also executing to him a general release of all claims, and demands, which they, as assignees, had on him, the defendant should pay, and promised to pay, (four months after the certificate should be confirmed by the Chancellor, and on the plaintiffs’ assigning the equity of redemption, as aforesaid, of the said stock to Lane, or any person he should appoint, and executing and delivering such general release,) the sum of 611*l.* to the plaintiffs, for the benefit of the creditors of the bankrupt.”—Then, after stating, that, in consideration of the promise and undertaking of the plaintiffs to perform all their part of the agreement, the defendant promised and undertook to fulfil all his part of it, the plaintiffs averred, “That, afterwards, viz on the 19th of July 1774, the bankrupt’s certificate was allowed and confirmed by the Chancellor; that the plaintiffs, at all times since the making of the agreement, had been ready and willing, and at the expiration of four months from the time of the certificate being confirmed by the Chancellor, viz. on the 20th of November 1774, offered to the defendant, to assign, as far as in them lay, the said equity of redemption, &c. and to execute and deliver to the said Lane a general release, &c. and did, then and there, tender to the defendant, a draft of such assignment and release to the said Lane, for his the said defendant’s approbation thereof, and did, then and there, offer to execute and deliver, and would, then and there, have executed and delivered, to the said defendant, such assignment and release, but that the said defendant, then and there, absolutely discharged the plaintiffs from executing the same, or any assignment or release whatsoever;—Yet the defendant,

[685]

* not regarding, &c. did not, four months after the said certificate had been confirmed by the Chancellor, nor, at any time before, nor since, although often requested, pay the said sum of 611*l.* or any part thereof, to the plaintiffs." There was another count nearly to the same purpose. The defendant *pleaded*, 1. The general issue. 2. To the *first* count, "That the said plaintiffs did never execute an assignment of the said equity of redemption, to the said *Lane*, or any person he appointed, and a general release to the said *Lane*, of all claims and demands which they, as assignees, had on him, at the time of making the agreement, and deliver or tender such assignment and general release so executed, to the said *Lane*, or the said defendant." 3. A like plea to the *second* count.

1781.

JONES
against
BARKLEY.

To these special pleas the defendant *demurred*, and shewed for cause, in the demurrer to the plea to the *first* count, that the defendant had not, by his plea, traversed or denied, or attempted to put in issue, any matter of fact alleged, by the plaintiffs, but had introduced and attempted to put in issue matters of fact not alledged, nor necessary to be alledged, and that the plea was no answer to the said first count, but evasive and argumentative; and the same to the plea to the *second* count.

Le B'anc, for the plaintiffs,—The averment of the plaintiffs, in the declaration, is equivalent to an averment of a performance of their part of the agreement, and, if it is, the plea is bad. 1. Wherever a man, by doing a *previous* act, would acquire a right to any debt or duty, by a tender to do the *previous* act, if the other party refuses to permit him to do it, he acquires the right as completely as if it had been actually done; and, if the tender is defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance, which he has occasioned. Thus it is laid down by lord *Coke*, "That, if a man make a feoffment in fee upon condition that the feoffee shall re-infeoff him before such a day, and, before the day, the feoffor disseize the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for the feoffor is the cause wherefore the condition cannot be performed, and therefore, shall never take advantage for non-performance thereof (c)." In *Lancashire v. Killingworth*, which is reported by Lord *Raymond* (d), and in other books (e) the plaintiff declared on a covenant by the defendant's testator, that, upon two days notice to be given to

[686]

(c) *Co. Littl.* 206. b.(e) *Com.* 117. 12 *Mod.* 529. 2 *Salk.*(d) *B. R. T.* 13 *W.* 3. 1 *Ld. Raym.* 623.

1781.

JONES
against
BARKLEY.

[687]

to the testator to accept 1000*l.* *Hudson's Bay* stock, at the *Hudson's Bay House* in, &c. and upon the transfer thereof to him, he would pay the plaintiff 2000*l.* and the plaintiff averred, that he gave notice, and was ready there, at the day, and offered to transfer the stock, but that the testator did not come to accept it: This was held ill upon demurrer, because the plaintiff did not aver a refusal by the other party, or that he staid till the last hour of the day, and the other did not come; but Lord Holt said, "That, though the money were payable upon the transfer, yet, if a *legal tender* had been made by the plaintiff, he would have been as well entitled to the money, as if he had made an actual transfer." So, in *Blackwell v. Nash* (f), which was debt for a penalty, the plaintiff declared, that he covenanted to transfer to the defendant, on or before the 21st of September, so much stock, and that the defendant, *in consideratione premissorum*, covenanted to accept and pay for it, and then averred, that he was at the books the 21st of September, & paratus fuit & obtulit to transfer to the defendant, who, then and there, refused to accept or pay. On demurrer, it was objected, that this was a condition precedent, and, therefore, to entitle himself to the action, the plaintiff ought to have shewn an actual transfer of the stock; but the court held that the expression "*consideratione premissorum*," meant, in consideration of the covenant to transfer, and not of an actual transfer, but that, if it had meant an actual transfer, a tender and refusal would amount to a performance. Both of these cases prove, that the refusal of the defendant excuses the non-performance, and completes the tender. In the case of *Peter v. Opie*, reported by *Ventris* (g), and *Saunders* (h), the same principle is to be found. That was *assumpsit*, on an agreement between the plaintiff and the defendant, that the plaintiff should pull down two walls, and build a house, &c. for the defendant, and that the defendant should pay him, *pro labore suo in & circa divulsionem*, &c. 8*l.* and that, in consideration that the plaintiff assumed to perform his part, the defendant assumed to perform his, and the plaintiff averred, that he was ready and offered to perform all on his part, but that the defendant had not paid him the money. After verdict, the defendant moved in arrest of judgment, because there was no averment of performance or tender. But the court, after several arguments, and a discussion how far the words "*pro labore*" made a condition precedent, held, that this was good after verdict. Now, the utmost that could be implied after the verdict, was the refusal on the part of the defendant;

(f) B. R. M. 9 Geo. 1. 1 Str. 535. 177. 214.

(g) B. R. M. 23 Car. 2. 1 Vent. (h) 2 Saund. 350.

fendant; for such an implication comes under the distinction in the rule on which a late case was decided (*i*), being only a circumstance attending the facts on which the plaintiff's title was founded; but, if nothing but performance would have done, then the very ground of action was not averred in the declaration, and *that*, according to the same rule, could not have been implied after verdict. To the same effect is a case stated in *Rollé's Abridgment* (*k*), from the Year-books (*l*), where, the condition of a bond being to raise a mill, the obligor came to the obligee, and said, all is ready to erect the mill, and asked when he would have him come with it and put it up, and the obligee answered, that he would not have it, and discharged him entirely of the mill. *That* was held to excuse him from the performance. And, in the same book (*m*), it is laid down, that, if a condition be, that the son of the obligor shall serve the obligee seven years, if he tenders his son, and the obligee refuses, or takes him, and, within the term, commands him to go away, the bond will not be forfeited. In like manner, where money is to be paid, tender and refusal is constantly held to be equivalent to performance. But, if it is said, that the tender in the present case was defective, and incomplete, still that cannot avail the defendant, because he has made it good by waver, having discharged the plaintiffs from doing any thing farther. That such a waver may make good a defective tender, is proved by many authorities, and, particularly, by the case of *Austen v. The Executors of Sir William Dodwell* (*n*), where, on a question whether interest should be allowed on a mortgage after an alleged tender of the principal, it appeared, that the plaintiff had tendered a bank bill to one of the executors, for him to take, out of the amount of it, the principal and interest then due. The executor refused to take it, and the plaintiff asking if he objected to the legality of the tender, and saying, that, if he did, he would presently turn the bill into money, he answered, that he did not; upon which, Lord KING held, that the tender in a bank note was not, strictly speaking, a legal tender, but, since it was proved that the defendant offered to turn it into money, *that* made it a good tender. Now, here, there was the most compleat waver of the irregularity, by the discharge from executing any assignment or release whatsoever. 2. What I have hitherto submitted to the court, is upon the supposition, that the execution of the assignment and release was a condition precedent; but

1781.

JONES
against
BARKLEY.

[688]

(i) *Rushton v. Aspinall*, *supra*, p. 679.(k) 1 *Roll. Abr.* 453. N. pl. 5.(l) 3 *Hen. 6.* 37.(m) 1 *Roll. Abr.* 455. P. pl. 1

Q. pl. 1.

(n) *Canc. H.* 1729. 1 *Eq. Case: Abr.* 318. pl. 9.

1781.

JONES
against
BARKLEY.

[689]

but I shall now contend, that there is no condition precedent in this case, but that this is one of those middle agreements in which what each has undertaken to do, is to be performed at the same time. There are no words necessarily importing priority here, as, "for, in consideration of, *proinde*," &c. but the agreement is, that the one party is to do an act, on the other's doing another. *Turner v. Goodwin* (o), reported in 10 *Modern*, is a case extremely applicable on this distinction. That was an action of debt upon a bond, by the condition of which, after reciting that A. was indebted to the plaintiff in a bond of 3000*l.* conditioned for the payment of 1500*l.* and had recovered judgment for that money, it was declared, that the defendant, upon consideration that the plaintiff would forbear suing out execution upon A. promised to pay the money, upon request, to the plaintiff, "he assigning over to him the judgment he had against A." The defendant pleaded, that the plaintiff had not assigned the judgment; to which the plaintiff replied, "That he was ready to assign, and requested the defendant to pay the money, which he refused (q)," and, to this replication, the defendant demurred. It was contended on the part of the defendant, that the words, "he assigning," &c. made a condition precedent. The case was argued several times, and there was, on the first argument, a difference of opinion, but, at last, judgment was given for the plaintiff, which could not have been, if the court had not held, that the assignment was not a condition precedent [2]. It may be said that 10 *Modern* is not a book of authority; but there is a recent case in this court which confirms the doctrine there laid down, and the distinction, stated to have been taken by Lord MANSFIELD. The case I allude to, is that of *Kingston v. Preston*, determined in *E. 13 Geo. 3.*

"It was an action of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated;—That, by articles made the 24th of March 1770, the plaintiff, for the considerations therein-after mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercier, at 200*l.* a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he would give up his business of a mercier

(o) *B. R. E. 12 Ann. 10 Mod. 153.*

(p) 10 *Mod. 190.*

[2] This case of *Turner v. Goodwin*, as stated in *Viner's Abridgment*, vol. 20. p. 185; pl. 9. is still more in point

to the present, for, there, the words are, "upon his assigning a judgment." But *Viner* cites the case from a book of still less authority than 10 *Mod.* viz. 2 *Barnard. 308.*

1781.

JONES
against
BARKLEY.

[690]

"to the plaintiff, and a nephew of the defendant, or
 "some other person to be nominated by the defendant,
 "and give up to them his stock in trade, at a fair valua-
 "tion; and that, between the young traders, deeds of
 "partnership should be executed for 14 years, and, from
 "and immediately after the execution of the said deeds, the
 "defendant would permit the said young traders to carry on
 "the said business in the defendant's house.—Then the de-
 "claration stated a covenant by the plaintiff, that he
 "would accept the business and stock in trade, at a fair
 "valuation, with the defendant's nephew, or such other
 "person, &c. and execute such deeds of partnership,
 "and, further, that the plaintiff should, and would, at,
 "and before, the sealing and delivery of the deeds, cause
 "and procure good and sufficient security to be given to the
 "defendant, to be approved of by the defendant, for the
 "payment of 250*l.* monthly, to the defendant, in lieu of a
 "moiety of the monthly produce of the stock in trade,
 "until the value of the stock should be reduced to 4000*l.*
 "—Then the plaintiff averred, that he had performed, and
 "been ready to perform, his covenants, and assigned for
 "breach, on the part of the defendant, that he had re-
 "fused to surrender and give up his business, at the end of
 "the said year and a quarter.—The defendant pleaded,
 "1. That the plaintiff did not offer sufficient security;
 "and, 2. That he did not give sufficient security for the
 "payment of the 250*l.* &c.—And the plaintiff demur-
 "red generally to both pleas.—On the part of the plain-
 "tiff, the case was argued by Mr. Buller, who contend-
 "ed, that the covenants were mutual and independent,
 "and, therefore, a plea of the breach of one of the
 "covenants to be performed by the plaintiff was no bar
 "to an action for a breach by the defendant of one of
 "which he had bound himself to perform, but that the
 "defendant might have his remedy for the breach by the
 "plaintiff, in a separate action. On the other side, Mr.
 "Grose insisted, that the covenants were dependant in
 "their nature, and, therefore, performance must be al-
 "leged: The security to be given for the money, was
 "manifestly the chief object of the transaction, and it
 "would be highly unreasonable to construe the agree-
 "ment, so as to oblige the defendant to give up a bene-
 "ficial business, and valuable stock in trade, and trust to
 "the plaintiff's personal security, (who might, and in-
 "deed was admitted to be worth nothing,) for the per-
 "formance of his part.—In delivering the judgment of
 "the court, Lord MANSFIELD expressed himself to the
 "following effect:—There are three kinds of covenants:
 "1. Such as are called mutual and independent, where
 "either party may recover damages from the other, for
 "the

1781.

JONES
against
BARKLEY.

[691]

" the injury he may have received by a breach of the
" covenants in his favour, and where it is no excuse for
" the defendant, to allege a breach of the covenants on
" the part of the plaintiff. 2. There are covenants which
" are conditions and dependant, in which the perform-
" ance of one depends on the prior performance of an-
" other, and, therefore, till this prior condition is per-
" formed, the other party is not liable to an action on
" his covenant [145]. 3. There is also a third sort of co-
" venants, which are mutual conditions to be performed
" at the same time; and, in these, if one party was
" ready, and offered, to perform his part, and the other
" neglected, or refused, to perform his, he who was
" ready, and offered, has fulfilled his engagement, and
" may maintain an action for the default of the other;
" though it is not certain that either is obliged to do the
" first act.—His Lordship then proceeded to say, that
" the dependance or independence of covenants was to
" be collected from the evident sense and meaning of the
" parties, and, that, however transposed they might be
" in the deed, their precedency must depend on the or-
" der of time in which the intent of the transaction re-
" quires their performance. That, in the case before the
" court, it would be the greatest injustice if the plaintiff
" should prevail: The essence of the agreement was,
" that the defendant should not trust to the personal se-
" curity of the plaintiff, but, before he delivered up his
" stock and business, should have good security for the
" payment of the money. The giving such security,
" therefore, must necessarily be a condition precedent.—
" Judgment was accordingly given for the defendant,
" because the part to be performed by the plaintiff was
" clearly a condition precedent."

But, it is equally clear, that, in the present case, the
agreement falls within the third class, as defined by Lord
MANSFIELD, and, therefore, absolute performance by the
plaintiff was not necessary to entitle him to his action,
nor had he occasion to aver any thing further than that he
was ready to assign the stock, and grant the release.

Wood, for the defendant,—The plaintiff's part of this
agreement was a condition precedent [† 145]. There
cannot be a more emphatical term to express priority of
performance, than the word "upon." The general prin-

[145] Vide *Duke of St. Alban's v. Shore*, C. B. T. 29 Geo. 3. H. Bl. 270. 279, 280. where a rule laid down in *Boone v. Eyre*, viz. that where a covenant goes to the whole of the consideration on both sides, it is a condition precedent, was adopted and confirmed.

[† 145] Vide *Boone v. Eyre*, C. B. T. 19 Geo. 3. 2 Blackst. 1312. where it was held, that, if one party covenants to do any thing, the other doing another, it is a mutual covenant, and not a condition precedent.

1781.

JONES
against
BARKLEY.

* [692]

ciple is true, that tender and refusal is sufficient, but the plaintiffs ought to have done every thing they had engaged to do, as far as was in their power, without any concurrence of the defendant; and, after that, if * they had tendered to compleat their part, and the defendant had refused his concurrence, such tender and refusal would have been equivalent to a performance. These plaintiffs had not proceeded so far. They might have executed a release, and tendered to deliver it to the defendant; for as it was not required by the agreement that it should be such a release as the defendant should approve of, they might have gone that far without his concurrence. But instead of doing so, they only tendered a draft of a release. It was the more necessary they should perform every thing in this case which they had bound themselves to do, as far as they could without any hindrance from the non-concurrence of the defendant, because there is no express mutual promise on their part to execute the release, so that the defendant could not have brought an action against them for not doing it. The two following cases are directly in point: *Viz.* 1. *Austin v. Fervoyse* (q), where the plaintiff declared, that he had bought a horse of the defendant for *twenty-two shillings* paid in hand, and for 11*l.* more to be paid at the death, or marriage, of the plaintiff, for which *he should become bound, with sufficient surety, by their writing obligatory*, and that the defendant, in consideration thereof, promised to deliver him the horse, when he should be required, and then averred, that, afterwards, *he offered to become bound to him*, but yet the defendant had not delivered the horse, though he had been required so to do. On *non assumpsit* pleaded, there was a verdict for the plaintiff, but the judgment was arrested, because he had not averred that he had tendered the obligation sealed, nor stated what security he had offered: 2. An *anonymous* case in *Rolle's Reports* (r), where, in an action on a bond conditioned for the delivery of a release on a certain day to the plaintiff, the defendant pleaded, that he was ready, on the day, to seal and deliver the release, that it was written, and the wax fixed to the label, but the plaintiff refused to accept of it. The plaintiff demurred: And it was laid down, by CHAMBERLAINE, *Justice*, that if a defendant is bound to do a thing which cannot be done without the plaintiff, and the plaintiff refuse to accept it, there the defendant is discharged if he does what is in his power, but, that, in that case, the defendant had not done all he could, for he ought to have sealed the release without the plaintiff, which he had not done. The same principle is to be gathered from the determination

(q) *T. 13 Jac. 1. Hob. 69. 77.*(r) *B. R. M. 20 Jac. 1. 2 Roll. 238.*

1781.

JONES
against
BARKLEY.

determination in *Blandford v. Andrews* (s); for, there, in an action on a bond conditioned for the defendant's procuring a marriage by such a time between the plaintiff and one J. P. the defendant pleaded, that the plaintiff had gone to J. P. and abused her, and told her, that, if he married her, he would tie her to a post, by reason whereof, the defendant could not procure the marriage by the time stipulated, and the plaintiff having demurred to the plea, it was held to be bad, because the defendant had not alleged, that he had used his endeavour to procure the marriage, and he ought to have shewn there was no default in him, and that he did as much as in him lay to procure it. Both this case, and *Austin v. Jervoyse*, are recognized by Lord HOLT, as law, in that of *Lancashire v. Killingworth* (t). With regard to the payment of money, if the person who is bound to pay should bring money in bags, and say to the other, "Here, I am ready to pay you the money," and the other should discharge him, surely that would not be sufficient, but he still ought to make an actual tender of the money. This was expressly adjudged in the case of *Suckling v. Coney* (u). As to the authorities relied on for the plaintiffs, they do not come up to the present case. In *Lancashire v. Killingworth*, a tender of the transfer, and refusal by the defendant, would have been sufficient, because the plaintiff could not have gone farther without the concurrence of the defendant—(Lord MANSFIELD, "Yes, he might transfer stock without the presence of the other party.")—The case of *Peter v. Opie* was after verdict, and therefore does not establish what is, or what is not good, upon demurrer. In the case stated by Rolle from the Year-books, the plaintiff could not have come upon the defendant's premises, to erect the mill, without his concurrence. The tender of the bank-note, in *Austen v. The Executors of Dodwell*, was equivalent to a tender of cash, especially being accompanied with an offer to turn it into money.

[694]

Le Blanc, in reply, admitted, that, unless there were a discharge by the other party from going farther, the plaintiff must take every step necessary for him to do, in which the defendant's concurrence is not requisite, before he can avail himself of a refusal by the defendant; but that none of the cases cited went so far as to controvert his position, that, where the defendant stops the plaintiff by the way, he may take advantage of it. The case of *Blandford v. Andrews* was, he said, the strongest, but, in that case, there was only an averment that the defendant *paratus fuit*, and then particular facts stated, from which an inference was to be drawn, that the plaintiff, by his conduct,

(s) B. R. M. 41 El. Cro. El. 694.

(u) Noy, 74.

(t) 1 Ld. Raym. 687.

conduct, had rendered it impossible for him to perform the condition; but no allegation of an express discharge by the plaintiff. As to the payment of money, in the case put of its being in bags, if the other party said, "I admit the money to be there, but I won't have it," he thought that would be a sufficient tender.

1781.

JONES
against
BARKLEY.

LORD MANSFIELD,—If ever there was a clear case, I think the present is. One needs only state what the agreement, tender, and discharge, were, as set forth in the declaration. It charges, that the plaintiffs offered to assign, and to execute and deliver a general release, and tendered a draft of an assignment and release, and offered to execute and deliver such assignment, but the defendant absolutely discharged them from executing the same, *or any assignment and release whatsoever*. The defendant pleads, that the plaintiffs did not actually execute an assignment and release; and the question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act [S]. Here, the draft was shewn to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs from executing it.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—The defence arises upon an objection to the declaration, and, therefore, the defendant should have demurred to it, and not have lengthened the record unnecessarily by two special pleas. None of the cases cited by Mr. Wood apply. The case in *Hobart* is very distinguishable from the present, for there was no refusal nor *discharge* in that case; the defendant was perfectly passive, and the plaintiff did not perform what he had undertaken, although there was nothing to prevent him. In the case of *Blandford v. Andrews*, the defendant had agreed to use his endeavours, and, notwithstanding what had been done by the plaintiff, he might have prevailed on the woman, before the time elapsed, to marry him. The questions on tenders are very different from this. They have arisen, not upon what shall excuse, but on what is, a tender. If the party pleads a tender, he must prove one. But the decision would have been very different in the cases of that sort, if there had been any act of the one party stated on the record, which had prevented the other from making a compleat tender. The cases cited

[695]

[S] So, if the performance is prevented by the neglect and default of the other party, that is equal to a

performance. *Hotham v. The East India Company*, B. R. H. 27 Geo. 3. 1 Term Rep. 638. 645.

1781.

JONES
against
BARKLEY.

cited by Mr. *Le Blanc* are very strong on the present point. In *Kingston v. Preston* the principle is clearly laid down, that, where something is to be performed by each party at the same time, he who was ready, and offered to do his part, may sue the other for not performing his. I am sure there have been other cases, of the same sort.

Judgment for the plaintiff [3].

[3] At the Sittings, at *Guildhall*, after this term, the cause was tried before Lord *Mansfield*, on the general issue, and a verdict found for the plaintiffs, with 611*l.* damages, but subject to the opinion of the court on a motion for a nonsuit.

The material acts, as reported by his Lordship, in *M. 22 Geo. 3. (a)*, when the rule for a nonsuit came to be argued, were as follow:—An agreement, as stated in the first count, was entered into, and signed by the defendant; afterwards, *Gardiner's* certificate was allowed, and, a year after that allowance, the attorney for the plaintiffs, by their direction, prepared a draft of an assignment and release, and, in company with one of the plaintiffs, tendered it to the defendant for his perusal, telling him the plaintiffs were ready, and would execute it, if he approved of it. The defendant returned the draft, saying it was needless for them to give themselves any trouble, for that *Lane*, (who was the bankrupt's father-in-law, and for whom the defendant acted as an attorney,) would never pay the money. The witness who proved the tender, said, upon his cross-examination, that *Carr*, who was one of the plaintiffs, was a most obstinate creditor, and by much the largest, that his debt was 1200*l.* and he persuaded him to sign, by telling him, that if he did not, the money would never be received. As soon as he had signed, the certificate was allowed. At the trial, the *Attorney General* objected, that it appeared upon the evidence, that this was an agreement to secure the payment of money due from the bankrupt, in order to induce a creditor to sign his certificate, and, therefore, was void, under 5 *Geo.*

2. c. 30. § 11. His Lordship, at the trial, thought this case not within the statute, because the 611*l.* to be paid to the plaintiffs, was not for the separate use of *Carr*, but for the benefit of all the creditors.

Dunning, and *Le Blanc*, argued for the plaintiffs, and contended, that this objection should have been taken on the demurrer, because the agreement, as proved, was stated on the record, and, if illegal, the plaintiffs had not shewn a good cause of action. But they also insisted, that it was not within the sense or intent of the statute. The object of that act, like that of all the other bankrupt laws, was to procure an equal distribution of the bankrupt's effects among all his creditors. This general object ought to be kept in view in construing them all, and the agreement in this case tended to secure an equal distribution, and therefore promoted the policy of the statutes.

The *Attorney General*, *Lee*, and *Wood*, on the other side, insisted, that the objection did not arise upon the record, the circumstances under which *Carr* had signed not being stated in the declaration. As to the objection itself, it was clearly founded in the words of the statute, which were general enough to extend to the case of a security for money given to all the creditors, and also within the mischief meant to be provided against; for the design of the act was to prevent creditors from taking advantage of the bankrupt's situation, [696] or practising on the compassion of his relations, in order to extort money as a price for doing what, it is true, they are not compellable to do by positive law; but what there is a moral

(a) On *Thursday* the 15th of *November*.

moral duty upon them to do voluntarily, if the bankrupt has fairly delivered up his whole property for their behoof. For this they cited a case of *Smith v. Bromley*, decided by Lord Mansfield, at Guildhall, at the Sittings after E. 1760 (a).

The court took time to consider, and on *Saturday*, the 24th of *November*, Lord Mansfield delivered their opinion in favour of the defendant.

His Lordship said, he well remembered the case of *Smith v. Bromley*, and that *Buller*, Justice, had a very good note of it, which he desired he would read, and which he accordingly did, to the following effect.

SMITH v. BROMLEY.

'Action for money had and received to the plaintiff's use; upon this case: The plaintiff's brother having committed an act of bankruptcy, the defendant, being his chief creditor, took out a commission against him, but, afterwards, finding no dividend likely to be made, refused to sign his certificate. But on frequent application, and earnest entreaties, made by the bankrupt to one *Oliver*, a tradesman in town, who was an intimate friend of the defendant, who lived in *Cheshire*, he got *Oliver* to write to the defendant several times, and he at last prevailed on the defendant to send him, (*Oliver*,) a letter of attorney, empowering him to sign the certificate, which *Oliver* would not do, unless the bankrupt, or somebody for him, would advance 40*l.* and give a note for 20*l.* more, and which, on *Oliver*'s signing the certificate for the defendant, the plaintiff, (who was the bankrupt's sister,) paid, and gave to *Oliver* accordingly, who thereupon gave her a receipt for the money, promising to return it, if the certificate was not allowed by the Chancellor. The certificate was allowed. The plaintiff afterwards brought her action against *Oliver* to recover back the 40*l.* from him, but, that action coming on to be tried before Lord Mansfield, at Guildhall, at the Sit-

tings after last *Trinity Term*, and it then appearing that *Oliver* had actually paid over, or accounted for, the 40*l.* to *Bromley*, and his Lord-

ship being clearly of opinion, that this action would not lie against the plaintiff's own agent, who had actually applied the money to the purpose for which it was paid to him, the plaintiff was nonsuited in that action; and now she brought this action against *Bromley* himself; which, coming on to be tried, it was proved, that the money was received by *Oliver*, and paid over to the defendant.

'It was contended for the plaintiff, that this money was paid, either without consideration, or upon one that was illegal, and, in either case, was recoverable back by this action.

'For the defendant, it was argued, that there was certainly a consideration for the payment of the money, to wit, the signing of the bankrupt's certificate; That, if this consideration was illegal, the plaintiff was *particeps criminis*, had paid it voluntarily and knowingly, and without any deceit, and so was within the case of *Tomkins v. Bernet*, (*H. 5 Will. 3. at N. Pr. before Treby, Chief Justice, 1 Salk. 22.*); but that there was nothing illegal in it; for it was the money of a third person, and so no diminution of the bankrupt's effects, or fraud upon his creditors; in which case only, whereby the distribution becomes unequal, is there any iniquity in receiving a consideration for signing the certificate; That, if the legislature had intended that money paid upon such consideration should be considered as illegally paid, they would have made it part of the clause in 5 *Geo. 2. c. 30.* which makes void bonds, bills, and other securities given for this purpose (b), in the same manner as, in the statute against gaming (c), there

1781.

JONES
against
BARKLEY.

(a) Mentioned *Law of Nisi Prius*, p. 132. Ed. 1775.

(b) § 11.

(c) 9 *Ann. c. 14.*

1781.

JONES
against
BARKLEY.

‘there is an exprefs
‘provision for the re-
‘covering back of mo-
‘ney loft at play (c)
‘[697]; That courts
‘of justice had always
‘construed that clause
‘of 5 Geo. 2. c. 30. in a strict man-
‘ner, as appeared by the case of
‘*Lewis v. Chase, Canc. E. 1720.* 1
‘*P. Will. 620.* and which case, as to
‘the merits, seemed to be less fa-
‘vourable for the creditor
‘[697] ‘than the present; for,
‘there, the bankrupt him-
‘self, not the third person, gave a
‘bond for the whole debt, in confi-
‘deration of a creditor’s withdrawing
‘a petition he had preferred to the
‘great seal against the allowance of
‘the bankrupt’s certificate: That, in
‘the present case, if there was any
‘guilt, the plaintiff was more guilty
‘than the defendant, for he had receiv-
‘ed very little towards his debt, which
‘was 1150*l.* That, if the plaintiff
‘had become security for her brother
‘the bankrupt, before the act of
‘bankruptcy, the defendant might
‘have received the money of her,
‘without any imputation; and that,
‘if a third person afterwards volun-
‘tarily paid what she might before
‘have become bound for, without any
‘hurt to the bankrupt’s other creditors,
‘there was no iniquity in the credi-
‘tor’s taking the money, so as it did
‘not amount to his whole debt.

‘But Lord Mansfield was of a differ-
‘ent opinion. He said, it was iniqui-

‘tous and illegal in the defendant to
‘take, and, therefore, it was so to
‘detain, this 40*l.* If a man makes
‘use of what is in his own power to
‘extort money from one in distress, it
‘is certainly illegal and oppressive,
‘and, whether it was the bankrupt or
‘his sister that paid the money, it is
‘the same thing. The taking money
‘for signing certificates is either an
‘oppression on the bankrupt or his
‘family, or a fraud on his other cre-
‘ditors. It was a thing wrong in it-
‘self, before any provision was made
‘against it by statute; for, if the
‘bankrupt has conformed to all the
‘law requires of him, and has fairly
‘given up his all, the creditor ought,
‘in justice, to sign his certificate;
‘but, on the other hand, if the bank-
‘rupt has been guilty of any fraud,
‘or concealment, the creditor ought
‘not to sign, for any consideration
‘whatever. If any near relation is
‘induced to pay the money for the
‘bankrupt, it is taking an unfair ad-
‘vantage, and torturing the compas-
‘sion of his family: if it is the money
‘of the bankrupt himself, it is giving
‘one creditor his debt to the exclusion
‘of the others, and a fraud upon
‘them. As to the case cited from
‘*Peere Williams, that* only affected the
‘person who petitioned. There might
‘have been sufficient of the creditors
‘in number and value to sign without
‘him, and he had a right to compro-
‘mise it upon what terms he pleased.
‘The petitioning, or not, was entire-
‘ly in his own power, and not like the
‘present

(c) § 2.

[697] By that statute the loser may
recover the money lost, within three
months after the loss. If he does not
sue for and recover it within that
time, any person may recover the sum
lost, and treble the value. But it has
been held, that the limitation of three
months is confined to the case of mo-
ney actually paid at the time, but that
if a bond or other security is given,
and the money, or part of it, after-
wards paid, a court of equity will
compel the repayment of that money

to the loser, after the expiration of the
three months. *Rawdon v. Shadwell,*
Canc. 1755. Ambl. 269. Thereason there
stated to have been given by Lord
Hardwick is, that the security being
void by 9 *Ann. c. 14.* the payment
under such security cannot be support-
ed. But, *Qu.* because by that statute
the contract also is not made void. *Vide*
infra, 743. By 16 *Car. 2. c. 7. § 3.*
if the loss at one sitting is more than
100*l.* the contract itself is made void,
and in *Rawdon v. Shadwell,* the bond
was for 500*l.*

present case. It is argued, that, as the plaintiff founds her claim on an illegal act, she shall not have relief in a court of justice. But she did not apply to the defendant or his agent to sign the certificate as an improper or illegal consideration: but, as the defendant insisted upon it, she, in compassion to her brother, paid what he required. If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover [£]; and it is astonishing that the Reports do not distinguish between the violation of the one sort and the other. As to the case of *Tomkins v. Bernet*, it has been often mentioned, and I have often had occasion to look into it; but it is so loosely reported, and stuffed with such strange arguments, that it is difficult to make any thing of it. One book says it was determined by Lord Holt; another, by Lord Treby. Certain it is, it was only a *Nisi Prius* case. I think the judgment may have been right, but the reporter, (*Salkeld*,) not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid, in part of principal and legal interest, upon an usurious contract; and, therefore, the action would not lie, for so far as principal and legal interest went the debtor was obliged in natural justice, to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid,

or an action will lie to recover back the surplus, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and, therefore, the man, who, from mere necessity, pays more than the other can in justice [698] demand, and who is called, in some books, the slave of the lender, shall be said to pay it willingly, and have no right to recover it back, and the lender shall retain; though it is in order to prevent this oppression, and advantage taken of the necessity of others, that the law has made it penal for him to take! This kind of reasoning is equally applicable to the case of a bailiff who takes garnish money from his prisoner. It is wrong for the bailiff to take it, and it is therefore wrong for the other to tempt him, and *volenti*, &c. and therefore he shall not recover it back; but this has been determined otherwise. The case of money given to a solicitor to bribe a custom-house officer, cited in that of *Tomkins v. Bernet*, is against his own agent, and, therefore, he cannot recover. But the present is the case of a transgression of a law made to prevent oppression, either on the bankrupt, or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother. This does not depend on general reasoning only, but there are analogous cases; as that of *Astley v. Reynolds*, (*B. R. M. 5 Geo. 2. 2 Str. 915*). There, the plaintiff having pawned some goods with the defendant for 20*l.* he refused to deliver them up, unless the plaintiff would pay him 10*l.* The plaintiff had tendered 4*l.* which was more than the legal interest amounted to; but,

1781.

JONES
against
BARKLEY.

[£] *S. P. Cockshott v. Bennet*, *B. R. M.* 29 *Geo. 3.* 2 *Term Rep.* 763.
766. *Jacques v. Withy*, *C. B. T.* 28

Geo. 3. H. Bl. 65. *Vide*, also, *Nerot v. Wallace*, *B. R. H.* 29 *Geo. 3.* 3 *Term Rep.* 17.

1781.

JONES
against
BARKLEY.

‘but, finding that he
‘could not otherwise
‘get his goods back, he
‘at last paid the whole
‘demand, and brought
‘an action for the sur-
‘plus beyond legal in-
‘terest, as money had and received to
‘his use, and recovered [†]. It is
‘absurd to say, that any one trans-
‘gresses a law made for his own ad-
‘vantage, willingly. Put the case,
‘that a man pawns another’s goods;
‘the right owner might be obliged to
‘pay more than the value, and would
‘have no relief, if this action will not
‘lie. As to the case of usury, it was
‘decided both by Lord *Talbot*, and
‘Lord *Hardwicke*, in the case of *Bo-
‘sanquet v. Dashwood* (a), on a bill
‘brought to compel the defendant to
‘refund what he had received above
‘principal and legal interest, that the
‘surplus should be repaid. Upon the
‘whole, I am persuaded it is necessary,
‘for the better support and mainte-
‘nance of the law, to allow this ac-
‘tion; for no man will venture to
‘take, if he knows he is liable to re-
‘fund. Where there is no temptation
‘to the contrary, men will always act
‘right.

‘The jury, under his Lordship’s
‘direction, found a verdict for the
‘plaintiff, with 40*l.* damages (b).

After *Buller*, Justice, had read the
note of the above case, Lord *Mansfield*
expressed himself to the following ef-
fect.

[†] If a party pawn goods on an
usurious loan, he cannot recover back
the goods on trover, unless he has first
tendered the money really advanced,
and, I presume, legal interest. *Fitz-
roy v. Gwillim*, B. R. E. 26 Geo. 3.
1 Term Rep. 153.

(a) *Canc. M.* 8 Geo. 2. *Ca. Temp.*
Talb. 38.

(b) In a case of *Clarke v. Shee*, M.

Lord *Mansfield*,—I adhere, and all
the rest of the court agree, to all the
doctrine there laid down. Though
the case in *Peere Williams* should be
right, it is different from this, and is
not within the letter of the statute, be-
cause it did not relate to the signing of
the certificate, but to the withdrawing
a petition against allowing it, and there
had been a recovery upon the bond at
law; and the report says, relief was
refused, because, where both have
equity, he who has the law must pre-
vail, and that the defendant had equi-
ty, because he was a fair creditor. I
doubt the reasoning, because a fair
creditor has no right to take an undue
and illegal advantage; but, certainly,
so far was true, that, if the bond was
void in equity, it was void in law.
What struck me, in this case, at *Guild-
hall*, was, that the agreement was with
the assignees acting for all the credi-
tors, and the benefit to go to all the
creditors. I thought, between a friend
of the bankrupt and all the creditors,
any agreement might be made; they
might agree to supersede the commis-
sion; they might agree to compound.
But, upon fuller consideration, I am
satisfied; and we are all of opinion,
that this case is within the letter of
5 Geo. 2. c. 30. and within the reason
of it. Great corruption and oppres-
sion might arise from a combination
of all the creditors, to exact condi-
tions for signing the certificate.

The rule was made absolute, for a
nonsuit to be entered [†146].

15 Geo. 3. [†147] Lord *Mansfield*, in
delivering the opinion of the court,
laid down, and enforced, the same
doctrine as in this case of *Smith v.*
Bromley. Vide, also, *supra*, p. 472.

[†146] Vide *Jacques v. Golightly*,
C. B. E. 16 Geo. 3. 2 *Blackst.* 1073.
Browning v. Morris, B. R. E. 18 Geo.
3. *Cowp.* 790.

[†147] Since reported, *Cowp.* 197.

1781.

HYDE *against* COGAN and Others.Friday,
12d June.

BY the statute of 1 Geo. 1. *ft.* 2. *c.* 5. commonly called the riot act, it is made felony without benefit of clergy, "for any persons unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, unlawfully, and with force, to demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship, certified and registered according to the statute of 1 W. & M. *sess.* 1 *c.* 18. or any dwelling-house, barn, stable, or other out-house (a)."

And, by another section of the same statute (b), it is enacted, that, "if any such church or chapel, or any such building, &c. or any such dwelling-house, barn, stable, or out-house, shall be demolished, or pull down, wholly, or in part, by any persons so unlawfully, riotously, and tumultuously, assembled, the inhabitants of the hundred in which such damage shall be done, shall be liable to yield damages to the person or persons injured and damnified by such demolishing or pulling down, wholly or in part, and such damages shall and may be recovered, by action to be brought in any of his Majesty's courts of record at Westminster, by the person or persons damnified thereby, against any two or more of the inhabitants of such hundred; such action for damages to any church or chapel, to be brought in the name of the rector, vicar, or curate of such church or chapel, that shall be so damnified; in trust for applying the damages to be recovered, in rebuilding or repairing such church or chapel." (The damages recovered to be levied on the inhabitants of the hundred, in the manner prescribed by the statute of 27 Eliz. *c.* 13. in the case of actions against the hundred, by persons robbed.)

In consequence of the riots in June 1780 (c), various actions were brought on this statute, and in several of them, a question arose, how far the indemnity was meant to extend; whether it was confined to the loss sustained in the building merely, and the necessary and direct consequences of its demolition, or whether it was intended to reach, also, such damages as arose from the destruction of furniture, and other property, by the rioters, at the time when they were employed in demolishing the building itself. In three of those cases, special verdicts were found, with the view of bringing the question to a solemn determination. One of them was an action in the Common Pleas, by *Wilmot*, one of the Justices of the peace for *Middlesex*. The two others, *viz.* *Maberly v. Sergeaunt*, and this which I am about to report, were in the *King's Bench*. Hyde was also

If persons riotously assembled in part demolish and pull down a dwelling-house, and, at the same time, destroy goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the Hundred is liable, under 1 Geo. 1. *c.* 5. to yield damages for the destruction of the furniture as well as of the house.

[700]

(a) § 4.

(b) § 6.

(c) *Supra*, p. 435.

1781.

HYDE
against
COGAN.

also a Justice of the peace, and had been one of the most active magistrates during the riots. The defendants, in all the three actions, were inhabitants of the Hundred of *Ossulston*, in which the city of *Westminster* is situated.

In this case of *Hyde v. Cogan*, the declaration contained four counts. The first charged, "That, after the last day of July 1715, (the day from which the act took effect,) and within twelve months before the exhibiting of the plaintiff's bill [1], divers persons, *to the number of twelve and more* [2], being, then and there, unlawfully, riotously, and tumultuously, assembled, demolished and pulled down part, *to wit*, the walls, doors, floors, tiling, roof, timber, ceilings, partitions, windows, window frames, window shutters, hearths, chimneys, and chimney pieces, of a dwelling house of the plaintiff, situate and being, &c. and in the said Hundred of *Ossulston*, of great value, to wit, of the value, &c. in contempt of his present Majesty, and to the great damage of the plaintiff, and against the form of the statute, &c. whereby, and by force of the said statute, an action had accrued to the plaintiff, being the person injured and damaged thereby, to recover against the defendants, then and still being inhabitants of the said Hundred, his damages, by him sustained by the demolishing and pulling down *his said dwelling house, as aforesaid*."

The second count was for demolishing and pulling down part, *to wit*, &c. of a dwelling house, "together with divers goods, chattels and furniture, *to wit*, &c. (enumerating various sorts of furniture, bedding, plate, cloaths, liquor, &c.) then and there being in the said last-mentioned dwelling house of the plaintiff, and wherewith the said last-mentioned dwelling house was, then and there, furnished, in contempt, &c. whereby, &c. an action hath accrued, &c. to recover, &c. his damages by him sustained, by demolishing and pulling down *the said part of his said dwelling house*." The third was, in other respects, the same with the first, but concluded as the second. The fourth was like the second, except that it concluded thus, "to recover, " &c. his damages by him sustained, by demolishing the "said part of his said last-mentioned dwelling house, and the "said goods and chattels of the said *William*, then and there "being in the same last-mentioned dwelling house."

The

[1] By § 8. of the riot act, "no person shall be prosecuted by virtue of this act, for any offence or offences committed contrary to the same, unless such prosecution be commenced *within twelve months* after the offence committed." This provision seems only to extend to criminal prosecutions for the felony, yet the above part of the form of the declaration is framed on an idea

that the action against the Hundred must be brought within a year. *Qu.*

[2] It is not perfectly clear, from the penning of the act, whether it is necessary that there should have been twelve or more rioters, in order to entitle the party injured to this action. According to the most obvious construction, that number is not necessary to constitute the felony created by § 4.

The cause was tried before ASHHURST, *Justice*, and the special verdict found: That divers persons, to the number of twelve and more, &c. did in part demolish and pull down the dwelling houses of the plaintiff, in the second and fourth counts mentioned, and that the said persons, being so riotously and unlawfully assembled as aforesaid, did also, "*at the same time*," demolish the goods, chattels, and furniture of the plaintiff in those counts respectively mentioned, then being in the said dwelling houses of the plaintiff in those counts respectively mentioned; and, further, that the said goods, chattels, and furniture were not, nor was any part thereof destroyed by means of the pulling down and destroying of the said dwelling houses, or either of them. Then there was a general assessment of the damages, "by reason of the pulling down and destroying in part of the said dwelling houses in the second and fourth counts," at 1090*l.*; a special assessment for damages in respect of the chattels, the goods, and furniture in the same counts, at 883*l.*, 3*s.*; and a general acquittal on the first and third counts.

The words "*at the same time*," in the verdict, had been substituted, by consent, before the argument on the motion of Baldwin, in the room of "*then and there*."

The finding in the case of *Maberly v. Sergeaunt*, was, *mutatis mutandis*, the same as here, except that instead of saying the goods were not destroyed by "*means of*, &c." it was said they were not destroyed in consequence of pulling down the house.

Baldwin, for the plaintiff, insisted on the authority of the case of *Radcliffe v. Eden*, decided by this court, in *Michaelmas Term*, 1776 [† 148]; and of *Wilmot v. Horton*, in which, after two solemn arguments, the court of *Common Pleas* had given judgment, the last term, for the plaintiff [3].

[† 148] Since reported, *Cowp.* 485.

[3] The following is a note of Lord Loughborough's argument, in delivering the opinion of the court in that case.

This is an action against two of the inhabitants of the hundred of *Ossulston*, in the county of *Middlesex*, to recover damages for the destruction of the plaintiff's dwelling house, furniture, and garden, by a number of persons riotously assembled on the 7th of *June* last, to the number of twelve and more. The action is founded on the 6th section of 1 *Geo. 1. st. 2. c. 5*. The object of that statute is expressed in the title—"An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters."—As a part of this

general object, by the sixth section an action is given to the persons whose houses shall be demolished or pulled down, wholly or in part, against the inhabitants of the Hundred, who are made liable to yield damages to the persons injured and damnified by such demolishing or pulling down, wholly or in part. All those damages which may be referred to the destruction of the fabric of the house, the plaintiff is admitted to be entitled to recover; but a doubt having arisen, whether he was entitled to any damages which did not fall under that description, the jury have found their verdict specially, in these terms:—That, upon the 7th of *June*, divers persons, to the number of twelve or more, did unlawfully, riotously, and tumultuously assemble themselves

1781.

HYDE
against
COGAN.

[702]

1781.

HYDE
against
COGAN.

themselves together, to the disturbance of the public peace, and, being so assembled, did, then and there, unlawfully, and with force, demolish and pull down part of the dwelling house of the plaintiff, and did, *at the same time*, break to pieces and demolish, in the same dwelling house, the goods and furniture of the plaintiff, then being therein, to the value of 700*l.* and then carried the same to the public highway, and set fire thereto, and totally consumed the same: and there is a similar finding with respect to the damage done to the garden of the plaintiff, viz. that, in *pulling down and demolishing the dwelling house*, they did damage to the garden of the plaintiff, then and there occupied and enjoyed by him as parcel of, or appurtenant to, the dwelling house; and demolished and destroyed the roots, plants, and trees, of the plaintiff, in the said garden, of the value of 30*l.* — The case has been twice argued very ably, and great difficulties have been suggested upon any construction which the court can adopt. It has been urged, That much inconvenience would arise from extending the provisions of the statute, which in express terms mentions only the dwelling house, to damages arising from the destruction of things not open and visible, and whose value cannot easily be ascertained. That the act is penal in the greatest part of its provisions, and must be so considered with regard to those who are made liable to the action; persons innocent of every thing except a supposed neglect of those exertions which, in many cases, would be utterly ineffectual. That the legislature, on this account, has guarded against the construction contended for on the part of the plaintiff, by tying up the damages by words of express reference, "*such demolishing or pulling down*," which necessarily lead to the consideration of what is described in the prior part of the section. That the case there described must be, *that demolishing or pulling down which would subject the authors of it to the*

felony created by this statute, and such felony can only be committed in the demolishing or pulling down the fabric of the house, for if *that* be left entire, the destruction of the furniture, however mischievous to the owner, and whatever intention it may manifest, does not amount to felony. These arguments have great force, and have raised very considerable doubts; but, upon a full consideration of the case, the court has thought itself obliged to decide, that the plaintiff is entitled to recover, as well for the destruction of the furniture, and the damage to the garden, as for the demolition of the house itself. The grounds upon which the determination turns are these. This statute, though penal in a great part of its provisions, and though, perhaps, there is something of a penal nature in transferring the action from the party committing the felony to the Hundred, yet, with respect to the party injured must be considered as remedial. Antecedent to this statute, and till the trespass was turned into a felony, there is no doubt, that, against the actors and their abettors, the [703] party injured would have been entitled to recover damages for all his loss. In lieu of that remedy, which can no longer be had, it was thought better to substitute an action against the Hundred in analogy to the ancient policy of the kingdom, by which the men of each district were bound to maintain peace and order, and to answer for the violation of them within that district. The act does not say, that damages shall be yielded for the injury *done to the fabric of the house*, but, *by the demolishing or pulling down the house*; and it seemed to be admitted in the argument, that, if the destruction of the furniture in the house were the necessary consequence of the demolition of the house itself, the plaintiff would be entitled to recover the full amount of his loss. If the parties engaged in the destruction of a house, had, by undermining it, thrown in the walls and roof, so that the furniture was crushed to pieces, all that damage, being the necessary effect of the demolition of the house, must have

1781.

HYDE
against
COGAN.

have been made good to the party injured, as within the very words of the statute; *viz.* "injured or damaged by such demolishing or pulling down." The act of felony, in that case, necessarily produces the damages sustained. But will not the principle extend, likewise, to those damages, which, though not the necessary consequence of the felony committed, yet are clearly the immediate effect of that cause? If, in order to destroy the walls, the mob break down the wainscoting and the glasses, or, if, by driving a beam or joist against the wall to throw that down, they break a glass fixed against the wainscot, it would be strange to argue, that such destruction, not being a necessary, but only an immediate consequence of demolishing the house, should not be repaired by this action. The case might be different as to consequences that are neither necessary nor immediate: If, for instance, one set of rioters had broken in on the 7th of June, and destroyed the house, leaving the goods in it, and, the next day, another party had come to the house so left, and robbed it of the furniture. It is here found by the jury, according to the truth of the transaction, that the destruction of the house, of the furniture, and of the garden, was done by the same rioters, at one and the same time; that the rioters, "in demolishing the house, did damage to the garden, &c." It seems, therefore, to be by no means any stretch of the act, to give it this construction, and the condition of the plaintiff would not be so good, otherwise, with respect to furniture, &c. as it was before. As to the argument urged, with great ingenuity,—“Of the inconvenience which must attend this construction, because of the uncertainty, in the first place, as to what furniture was in the house, and, in the next place, the still greater uncertainty, what the value of that furniture was; whereas the building is visible, all know what it has been, there must necessarily be persons qualified and competent to give a tolerable estimate of it, and the public cannot, be liable to much imposition on that account.” That argument has,

Vol. II.

T

undoubtedly, a very specious appearance; but it amounts to no more than this, that a case may happen, where the wife and benevolent purposes of the law may be perverted to a fraudulent intent. The present instance, which has brought a great number of these cases before the court, has proved it to be possible to guard against the Hundred's being charged beyond the real damage; though there might, at first, be some ground to suspect that the imagination of the party and his friends would exaggerate the amount of it. In most of the actions that have been tried, the loss in respect to furniture has been calculated with tolerable precision; and, if care is taken on the part of those who are to answer for it (and, from the multitude of cases which unfortunately happened last summer, it appears that care may be taken,) there is no great reason to believe, that a jury will be deceived by an over-rated estimate of the injury which the party has sustained in that species of property. If fraud may be practised, it is a fraud of a nature open to detection; and, by a reasonable diligence on the part of those affected by the consequences, the effects of the fraud may be prevented. This is not like the case of an action against the Hundred upon a robbery, where the value rests solely in the estimate of the party, and you are obliged to depend on his honesty. The argument, therefore, has not such weight, as at first it seemed to carry with it. But, if it had much more than it has, it would not be sufficient to controul the operation of the act, in a case which falls within its principle. Therefore, upon the whole, we are of opinion, that the plaintiff ought to have all the damages the jury thought fit to give: That he is entitled to recover for the destruction of the furniture, and of the garden, as such destruction is found to be the immediate consequences and effect of the destruction of the house, and done at the same time.

Taylor

1781.

HYDE
against
COGAN.

Taylor argued for the defendants.—Among other things, he said, the negative part of the finding distinguished this case from both the others. The new felony created by the statute, in the fourth section, is clearly confined to the destruction, in whole, or in part, of the buildings themselves, and the sixth section refers to the fourth, and ought not to be carried beyond it. The intention of the legislature was to substitute the relief against the Hundred, for the remedy by action of trespass against the individual offenders; the *civil* remedy against them being merged in the felony. Upon this principle, the construction must be, that the Hundred is only to answer for such damages as arose from the felonious part of the offence. The statute is to be considered as penal, not only against the rioters, but against the inhabitants of the Hundred; for it subjects them to the damages, as a *punishment* for not preventing the mischief. Indeed, to construe a law as remedial in one part, and as penal in another, seems inconsistent; and, since this law is, in many respects, so highly penal, it ought to receive the strictest interpretation. It may be said, that, unless the Hundred were to be held liable for the furniture, the sufferer would be in a worse situation than before, because, now, as the offender is made a felon for demolishing the building, the remedy against him for destroying the furniture is also gone. But there are other instances of a like sort, where the remedy against the Hundred is not co-extensive with the loss of remedy against the offender. For instance, in cases of robbery, the Hundred is not liable if the robber is taken within 40 days after the crime was committed (*a*), nor, in cases under the black act (*b*), if the offender is convicted within six months. If the contents of a house, furniture, &c. had been meant, they would have been specially mentioned in the act.

Lord MANSFIELD was present, but declined giving any opinion.

[705]

WILLES, *Justice*.—According to this verdict, we must consider the demolishing of the goods and the pulling down of the house as one transaction, committed at one and the same time. The jury go still farther, and say, that the goods were in the house. Then comes the negative part of the finding; but that does not state the destruction of the furniture to have been a separate act. It was already found to have been the same. It would be overturning the good sense of the statute to restrain it in the manner contended for by the counsel for the defendants. The sixth clause I rather consider as remedial: It may be said to be penal as to the Hundred, but it is certainly remedial

(*a*) 1; *Ed. 1. f. 2. c. 1. 28 Ed. 3.*
c. 11. 27 Ed. c. 13. 8 Geo. 2. c. 16.

(*b*) 9 *Geo. 1. c. 22.*

remedial as to the sufferer. The words are, that the inhabitants of the Hundred in which such damage shall be done, shall be liable to yield damages to the person or persons injured by such demolishing or pulling down. What damages? The value of the house is not the whole of the damage. The furniture may be worth twice as much as the building. The decision of the court of *Common Pleas* goes full as far as this case, (though there were in that case no negative words in the finding,) for it extended the remedy to damages out of the house. But in *Ratcliffe v. Eden*, there was what was tantamount to this negative finding, for it was not stated, that the house was demolished or pulled down wholly or in part, and, if any thing is to be implied, it is rather, that the house itself was not demolished in that case, at least the windows, shutters, and doors, were only specified in the case, and it was not even stated, that the household goods were destroyed by means, or in consequence, of the demolition of any part of the house. It rather seems, that the rioters merely broke open the doors and windows for the purpose of getting into the house. In point of policy, the construction contended for on the part of the plaintiff is certainly to be preferred, if the case were new, which it is not. I think the plaintiff entitled to recover for the furniture as well as the house.

ASHHURST, *Justice*,—I am of the same opinion. If the demolishing of the furniture had been a separate act, I agree with the counsel for the defendants, that it would not have been felony, and that the sufferer could not have recovered against the Hundred. But, here, being done at the same time, and in pursuance of the riotous transaction, it is to be considered as part of one and the same act. It was not a necessary, but it was an immediate, consequence of the demolition of the house. The rioters got possession of the furniture by demolishing the house. The act was so much the same, that if one of them had not been in the house, but had received some of the furniture in the street from the others, I think he would have been guilty of felony, as being concerned in the riot. The two cases relied on are not in my opinion to be distinguished from this. The purpose of the act is remedial, and therefore it ought to receive a liberal construction.

BULLER, *Justice*,—The statute is so penned, that the words might possibly admit of two constructions, and, therefore, it is material to consider, whether it is penal or remedial; because there is a well-known difference in the rule of construction, as applied to laws of the one sort, and of the other. Where they are remedial the interpretation is to be liberal, so as best to apply to the end.

1781.

HYDE
against
COGAN.

1781.

HYDE
against
COGAN.

[707]

But a law may certainly be penal in one part, and remedial in another [4]; and that is the case here. There is no danger of the liberal construction of the remedial part being extended afterwards to the penal. The distinction has been too long established for any apprehension of that sort. If the clause upon which this case arises is remedial, which I think it is, the most extensive sense must prevail; and it was so held in both the cases cited at the bar. *Ratcliffe v. Eden* was, I believe, the first case on the construction of the statute, and it was fully considered. Mr. Justice ASTON said, the sense of the act was, that the damages to which the party offending would have been liable, at common law, should be transferred to the Hundred. Mr. Justice ASHHURST stated, as a ground of his opinion, that the whole was one act, and, my Lord, after having given a full opinion at first, added, afterwards, "I do not consider the demolition of the household goods as "consequential, but as a part of the act." A mistaken idea, that the case was not deliberately decided, was thrown out in the *Common Pleas*, and produced two arguments in the case of *Wilmot v. Horton*. It is not possible to distinguish either of the two from this, on any fair principle. In the last, Lord LOUGHBOROUGH, in delivering the opinion of the court, stated the destruction of the goods, &c. as the *immediate*, not the *necessary*, consequence; so that they did not decide, as has been supposed here in the argument for the defendants, on the ground of the one sort of damage having been the *necessary* consequence of the other. The destruction of the furniture was not, in either of the cases, the necessary consequence of the demolition of the house; because it was *part* of the same act. There are, therefore, two prior decisions in point; and, if the question were more doubtful, it must be governed by those decisions. But, independent of authorities, as the clause is remedial, it must receive a liberal construction. As to the supposed difficulty there may be in ascertaining the *quantum* of damages from the destruction of furniture (a), such amount is more capable of proof than the value of the house, where the state of the timbers, &c. is often invisible, whereas the quantity and quality of the furniture must be known, in most instances, to many witnesses; and nothing more will be to be done, in these cases, to estimate the loss, than what is necessary in every action of *trover* for household goods.

Judgment for the plaintiff [† 149].

[4] *Bones v. Booth*, C. B. M. 19 Geo. 3. 2 Blackst. 1226, 1227.

(a) This was a topic urged at the bar in the argument here, and much relied on in the case of *Wilmot v. Horton*.

[† 149] *Vide Mason v. Sainsbury*, B. R. E. 22 Geo. 3. and the *London Assurance Company v. Sainsbury*, B. R. T. 23 Geo. 3. & *Cam. Scacc. H.* 2; Geo. 3.

1781.

Friday,
22d June.STONE *against* FORSYTH.

ISSUE being joined on a plea in bar to an avowry for rent in arrear, the cause was tried before Lord MANSFIELD, at Guildhall, at the Sittings after last *Hilary Term*, and a case reserved, which stated;

That *Ann Wilson*, widow, being possessed of a leasehold estate, for a long term of years, and money and goods, and having two children, prepared *her will*, (which was set forth in the case, *in hæc verba*,) by which she gave the leasehold estate, and her money and goods, to her executors therein named, in trust for her children. The will concluded thus.—“In witness whereof, I have hereunto set my hand and seal, the 27th day of March 1779, *Ann Wilson*. Duly attested by *John Crouth* and *John Davies*.”

—That in contemplation of a marriage with the defendant, the said *Ann Wilson* had entered into articles to the following effect: “Articles of agreement made the 17th of April 1779, between, &c.”—That the articles recited an intended marriage between her and the defendant, and that it was agreed, that she should have all her leasehold estate, money, &c. for her separate use. That, for that end, the defendant covenanted and agreed with one of the persons made an executor by the will, as a trustee for the wife, that, notwithstanding the intended marriage should take effect, and, from and after the solemnization thereof, the leasehold estate should be held and possessed by such person, and to such uses, as she should, at any time during her life, limit, give, demise, order, appoint, or dispose of, either by her last will and testament, in writing, or by any other writing, purporting or intending to be her last will and testament, or by any other writing, to be signed with her hand, or to which she should subscribe her mark, in the presence of two or more credible witnesses; that the defendant would permit and suffer her to make such will, or other writing, as aforesaid, and that he would permit and suffer such will thereafter to be made, to be fully proved by the executors in such will named, and probate of such will to be had and taken as usual; and that the person or persons to whom the said *Ann* should give and dispose of her separate estate, by her will or any other writing that should be signed, sealed, and executed, by her, in the presence of two or more credible witnesses, as aforesaid, should, and might, peaceably enjoy the same. That the said will and marriage articles were both executed on the same day, at the same place, and before the same witnesses.

That the marriage was solemnized on the 27th of April

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1779,

[708]

1781.

STONE
against
FORSYTH.

1779, and *Ann Wilson* died on the 31st of December 1779. That the said will *had not been proved*, but letters of administration of the estate and effects of the testatrix had been granted to the defendant. That the will had been offered to be proved, but probate was refused, only because, upon the face of the articles, the will bore date before the articles.

The question stated for the opinion of the court was, whether the will was a valid disposition of the effects of the wife. If it was, a verdict to be entered for the plaintiff, and *vice versa*.

This case was to have been argued this day, by *Bower*, for the plaintiff, and *Morgan*, for the defendant.

[709]

Bower stated the question to be a mere question of presumption, as to the priority in point of time in the execution of the two instruments, the will, and the articles; for, if the will was posterior to the articles, though executed the same day, it was then valid [1], and the defendant had no title; but Lord MANSFIELD said, another question would first arise, *viz.* whether the court could take any notice of the paper called a will, till proved in the Ecclesiastical court. *Bower*, upon this, contended, that, though called a will, yet this, in truth, was not one, in a strict legal sense, but an appointment, and, therefore, did not require a compliance with the rules respecting wills properly so called. But his Lordship said, it had been settled, that, before you can come into Chancery, on a title to personal property, under the will of a feme covert [1], to whom a power of making a will is reserved, such will must be proved at the Commons; and that the same rule must prevail in a court of law; that, if the Ecclesiastical court would not grant probate, the proper course was to appeal to the Delegates [† 150].

The *Postea* to be delivered to the defendant [2].

[1] *S. P. Taylor v. Rains, B. R. H. 1 Ann. 7 Mod. 147.* In 11 Vin. Title *Executor D.* pl. 1. in marg. this is supposed to be the case with *Shardelew v. Naylor, 1 Salk. 313.* though the two reports differ in this material fact, that in 7 *Mod.* the will is stated to have been executed before, in *Salk.* after, the marriage.

[1] Though this will was executed before the marriage, yet, as the marriage, if there had been no power reserved by the articles, would have revoked it (a), and it could only be valid on the supposition of its being executed subsequent to, and authorized

by them, it must be considered exactly in the same light as if made after the marriage.

[† 150] *Vide Ross v. Erwer, Cane, 1744. 3 Atk. 156. 160. 162. Jenkins v. Whitehouse, B. R. M. 31 Geo. 2. 1 Bur. 431.* According to which cases and also *Taylor v. Rains*, cit d supra, p. 708. note [1], the regular course, in cases like this, is, for the Spiritual court not to give probate of the will, but *administration*, with the will, as a testamentary paper, annexed.

[2] There were several avowries on the record, and issues joined on all; and, the jury having found for the plaintiff

(a) *Vide Brady v. Cubitt, M. 19 Geo. 3. supra, p. 34 to 40.*

plaintiff on all but that on which the case was reserved, afterwards, in *Trinity Term*, 22 Geo. 3. *Morgan* obtained a rule to shew cause why the Master should not allow the defendant the full costs on all the issues. He contended, that a defendant or avowant in replevin, is an actor, and to many purposes considered in law as a plaintiff. That different avowries, therefore, ought to be looked on as different counts in a declaration, and that when separate issues are joined on different counts, and any one of them is found for the plaintiff, he is allowed the costs of the whole record. *Vide supra, Butcher v. Green*, E. 21 Geo. 3. p. 652. That, by § 5. of 4 Ann. c. 16. if any special matter pleaded by virtue of that statute by any defendant, tenant, or plaintiff in replevin, shall be judged insufficient on demurrer, or found for the plaintiff or demandant on verdict, costs are given; but that it could not be supposed, that, in the general words "defendants or tenants," were included avowants or defendants in replevin; and if they were not included, they

ought, upon general principles, to have their full costs, in such a case, because, if any one of the avowries is found against the plaintiff, it shews that he had no cause of action. On *Wednesday the 5th of June 1782. Wallace and Bower* shewed cause; and Lord MANSFIELD, WILLES, and BULLER, *Justices* (ASHHURST, *Justice*, being absent,) were clear, that an avowant is a defendant within the meaning of the act, and said, it had always been so considered in the taxation of costs.

Indeed if it were not so, there would be no authority under § 4. to plead different avowries.

Vide Chan v. Bowles, B. R. H. 2 & 3 Will. & Mar. where it was held, that an avowant is not a plaintiff within the meaning of 3 Hen. 7. c. 10. so as to be entitled to costs on the affirmance of a judgment in his favour upon a writ of error. *Carth. 122. 4 Mod. 7. 1 Show. 13. 165. 1 Salk. 95. 205.*

DOE, Lessee of Sir WILLIAM GIBBONS, Bart.
against POTT and Others.

[710]

Tuesday,
16th June,

UPON an ejectment, tried before Lord MANSFIELD, at the Sittings for MIDDLESEX, a case was reserved for the opinion of the court, the material part whereof was as follows:

By lease and release, dated the 29th and 30th of March 1754, the manor or lordship of *Stanwell*, with the rents of millize, rents of the freehold and customary tenants, and all rights, privileges, and appurtenances, to the said manor and divers freehold lands, and also the manor of *Sheppcotts*, alias *Hammonds*, with the rights, members, and appurtenances thereof, and divers freehold messuages and lands, were, for a valuable consideration, conveyed by the trustees of the Earl of *Dunmore* deceased, to Sir *John Gibbons*, and his heirs. By indenture, dated the 2d of April following, Sir *John Gibbons* mortgaged all the *aforesaid premises* to the said trustees, for a term of 1000 years, for securing 10,000*l.* and interest, being the sum he was deficient of

payment of such surrendered copyholds.—If a mortgagor devises the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate to trustee in trust for the mortgagor, such a transfer of the legal estate shall not operate as revocation of the will.

1781.

DOE
against
PUTT.

[711]

paying for his original purchase. By lease and release, dated the 7th and 8th of *April* 1755, Sir *John Gibbons* mortgaged in fee, to *Agatha Child*, the manors and premises so purchased by him as aforesaid of and from the trustees of the Earl of *Dunmore*, and therein particularly mentioned, for securing 20,000*l.* and interest, out of which sum the 10,000*l.* and interest due to the Earl of *Dunmore*'s trustees was paid off, and the term of 1000 years assigned, by an indenture, dated the said 8th of *April* 1755, to a trustee for the better securing the 20,000*l.* which was not paid at the time stipulated in the mortgage. Between the time of this last mortgage to Mrs. *Child*, and the year 1767, Sir *John Gibbons* purchased several copyhold tenements and lands, (being part of the premises in question,) held of the manor of *Stanwell*, and the customary tenants, of whom he purchased them, surrendered them into the hands of the lord of the said manor, by the rod, (some into the hands of Sir *John* himself, and some by the hands and acceptance of the steward of the said manor,) unto the said Sir *John Gibbons*, (who was described in the surrenders as lord of the said manor of *Stanwell*,) his heirs and assigns for ever. By lease and release, dated on the 17th and 18th of *April* 1755, certain freehold messuages, lands, tenements, and hereditaments, situated in *Stanwell*, were sold and conveyed to Sir *John Gibbons*, and all and singular the said last mentioned messuages, lands, tenements, and premises, were, by lease and release, dated on the 19th and 20th of *April* 1755, mortgaged in fee to Mrs. *Child*, for the further securing the 20,000*l.* By lease and release, dated on the 30th and 31st of *August* 1771, in consideration of a marriage then intended between the lessor of the plaintiff, (the eldest son of Sir *John Gibbons*,) and his now wife, and of her marriage portion;—(after reciting that Sir *John Gibbons* was seised of all that the manor, or reputed manor or lordship of *Stanwell*, and of the manor of *Shepcotts*, alias *Hammonds*, and of the capital messuages, and of divers other messuages, mills, lands, tenements, and hereditaments, which he purchased from the trustees of the Earl of *Dunmore*, subject to a mortgage thereof made by him to *Agatha Child*,)—Sir *John Gibbons* conveyed to *William Butler* and *Joseph Pickering*, in fee, all that the manor or lordship of *Stanwell*, with the rights, members, jurisdictions, privileges, rents of assize, rents of the freehold and customary tenants, and all other the appurtenances thereunto belonging, and also all that the manor of *Shepcotts*, alias *Hammonds*, with the rights, members, and appurtenances thereof, and all and singular the messuages, lands, tenements, hereditaments, and premises therein particularly described, and are the same premises which he purchased of the said trustees of the Earl of *Dunmore*, and which were

conveyed to him by the indentures of the 29th and 30th of March 1754, and also comprised in the mortgage to the said *Agatha Child*, of the 7th and 8th of April 1755, to secure an annuity of 1000*l.* out of the same to the lessor of the plaintiff, during his and his father's joint lives, and to the intended wife of the lessor of the plaintiff, after the death of her said intended husband, as her jointure, and, subject thereto, to the use of Sir *John Gibbons* for life, remainder to trustees to support, &c. remainder to the use of the lessor of the plaintiff for life, with several remainders over, and the ultimate remainder to Sir *John Gibbons* in fee. On the 22d of November 1772, Sir *John Gibbons* made his will, whereby, after reciting the last-mentioned lease and release of the 30th and 31st of August 1771, he devised the reversion in fee of the said manors of *Stanwell* and *Shepcotts*, alias *Hammonds*, and all the lands, hereditaments, and premises which he purchased of the trustees of Lord *Dunmore*, deceased, to Dr. *Erasmus Saunders*, (since deceased,) and *Joseph Pickering*, in fee, upon certain trusts and to certain uses not material to be stated. The will then recited, that he had made several very considerable purchases of several other real estates at *Stanwell* aforesaid, and elsewhere in the same county, since the purchase of his said manor of *Stanwell*, and other premises therein before mentioned, made of the trustees of the Earl of *Dunmore*; and he, thereby, gave to the said Dr. *Erasmus Saunders*, and *Joseph Pickering*, and their heirs, all other his messuages, lands, hereditaments, and real estates at *Stanwell*, or elsewhere in the said county (of *Middlesex*), with their appurtenances, (except such parts thereof as were inclosed within his gardens and park,) in trust to sell and dispose thereof, and, with the money arising from the sale, to pay and discharge all principal and interest due on any mortgages, or other incumbrances affecting the said estate, and, from and after payment thereof, to apply the residue of such purchase monies in paying and discharging the fortunes therein before given to his younger children. At the time when Sir *John Gibbons* made his will, the manors of *Stanwell* and *Shepcotts*, alias *Hammonds*, were in mortgage to Mrs. *Child*, as before stated, and all the copyhold premises before mentioned were purchased by him after the mortgage made to Mrs. *Child*. By lease and release, dated the 1st and 2d of March 1776, in consideration of the sum of 20,000*l.* (Mrs. *Child*'s mortgage money,) paid to the persons then entitled to the same, by *Buller* and *Pickering*, the trustees in the marriage settlement of the lessor of the plaintiff, all the said manors, and all the other messuages, lands, tenements, and hereditaments, contained in the said mortgage of the 7th and 8th of April 1755, and purchased by Sir *John Gibbons* of the said trustees of the Earl of *Dunmore*, were, at the request of Sir *John Gibbons*, and of the lessor of the plaintiff and his wife, released and confirmed

1781.

Doe
against
Pott.

[712]

1781.

Doe
against
POTT.

[713]

firm'd to the said *Buller* and *Pickering*, and their heirs, to the same uses and trusts as by the marriage settlement of the 30th and 31st of *August* 1771, were limited concerning the same, freed and discharged from all equity, terms, provisos, and conditions, of redemption. By lease and release, dated on the same days respectively, and made between the same parties with those last-mentioned,—after reciting that the 20,000*l.* and all interest had been paid, and that, thereby, the premises conveyed for better securing the payment thereof were become released and discharged,—all and singular the capital messuage, and all other messuages, lands, tenements, hereditaments, and premises, in the lease and release of the 19th and 20th of *April* 1755, mentioned, were duly granted, released, and conveyed to the use of the said *Joseph Pickering*, his heirs and assigns, free from the proviso of redemption contained in the release of the 20th of *April* 1755, in trust for Sir *John Gibbons* in fee. Sir *John Gibbons* died in *June* 1776, without revoking or altering his will, greatly indebted to many persons by bonds, leaving the lessor of the plaintiff his heir at law: And the surviving trustee under the will, conceiving himself entitled to the premises contained in the different surrenders herein before mentioned, and also to the freehold premises contained in the lease and release of the 17th and 18th of *April* 1755, had agreed to sell the same to pay Sir *John's* debts, but the lessor of the plaintiff also conceiving himself entitled to the same premises, he hath brought this ejectment for the recovery of the possession thereof.

Upon this case, the questions stated for the opinion of the court, were;

1. Whether the lessor of the plaintiff, as heir at law of his father, or as tenant for life in possession of the estates comprised in his marriage settlement, is entitled to the premises contained in the said surrenders?

2. Whether the lessor of the plaintiff, as heir at law of his father, is entitled to the premises contained in the lease and release of the 17th and 18th of *April* 1755?

On *Tuesday*, the 19th of *June*, the case was argued, by *Lawrence*, for the plaintiff, and *Wilson*, for the defendant.

The arguments for the plaintiff were to the following effect.

1st Question.—On this part of the case, it was contended; 1. That the copyhold lands passed to Sir *William Gibbons* for life by the terms of the marriage settlement; or, 2. That they were not comprised in the will of Sir *John Gibbons*, and, therefore, descended to Sir *William*, as his heir at law.—1. The copyhold lands were parcel of the manor of *Stantwell*, for they are stated to have been held of the manor, and, in contemplation of law, customary lands held of a manor are parcel thereof. The freehold interest is in the lord, for which reason the copyholder cannot prescribe

1781.

Doe
against
Pott.

[714]

in a *que estate*. The forms of *conveyancing*, as well as those of *pleading*, prove the same position; for copyholds pass by surrender to the lord, and, from the nature of a surrender, it can only be made to one who has a higher interest in the estate than the person who surrenders. The copyholder is, in point of law, only a tenant at will. These copyhold lands, therefore, passed by the original and subsequent deeds. The words are certainly sufficiently comprehensive to include them; for they not only mention "manor or lordship," but also "all rights, privileges, and appurtenances thereunto belonging." Sir *John Gibbons*, as mortgagor in possession, could do no acts to injure or diminish the security of the mortgagee; though he might do such as should tend to her advantage. He might take a surrender, or an escheat, for the benefit of the mortgagee. So it is settled, "that if one who has a manor devise it, and, after, a tenancy escheat, that shall pass by the devise as part of the manor;" *Bunter v. Coke (a)*. The surrenders to Sir *John Gibbons* were the mere determinations of estates at will in parcel of the manor mortgaged to Mrs. *Child*. The lands surrendered became, after the surrender, part of the mortgaged premises comprised in the deeds of the 7th and 8th of April 1755, and in the marriage settlement of Sir *William Gibbons*; and, therefore, after the redemption of the mortgage, and the death of Sir *John*, they vested in Sir *William* as tenant for life.—2. But, if the court should think the settled estate confined to such lands as Sir *John* had at the time of the first mortgage to Mrs. *Child*, Sir *William* will be entitled to them as heir at law, if they did not pass by the will. Now, by the will, nothing is devised but a *reversion* in the manors, and the freehold estate, (exclusive of the manors,) which he purchased afterwards.

2d Question.—There are also two grounds upon which Sir *William's* claim to the freehold purchases of his father may be supported.—1. The purpose of the second devise was to pay off mortgages and other incumbrances affecting the lands, and which were a real lien, and would be a charge upon them into whatever hands they might come. Now, after the mortgage on the freehold purchase was paid off, there were no incumbrances on the freehold estate that would have followed it into whatever hands it came. The testator is not stated to have left any bonds which would affect the land. Before the statute of 3 W. & M. c. 14, lands in the hands of a devisee were not liable to bond debts, and, since the statute, it has been held "that a bond is not a lien upon the land;" *Parflove v. Weedon (b)*. If an heir at law sell the lands, a bond creditor cannot follow them. The purpose of the devise to the trustees being, therefore,

(a) B. R. M. 6 Ann. 1 Salk. 237, (b) Canc. Trin. 1718. 1 Eq. Ca. 38.

1781.

Doe
against
Pott.

therefore, fulfilled before the testator's death, the devise itself became void.—But, 2. If this construction should not be adopted, still, an event happened after the making the will by which that part of it which relates to the freehold purchase was revoked. It is an established rule, that, if the nature of a testator's interest is altered after the devise, such alteration operates as a revocation in law *pro tanto*. Thus, if a man, seised in fee, make a will of lands, and, afterwards, make a feoffment, or levy a fine, to the use of himself in fee, though he is in of the old estate, yet this is a revocation. 1 *Rolls's Abr.* 614, 615. Now, in this case, at the time of the will, the legal estate was in Mrs. Child, and, after the will, was transferred from her, and conveyed to *Pickering*, and, though the equitable interest may have remained the same after the conveyance to *Pickering*, yet, there having been an alteration in the legal estate after the will, that shall operate as a revocation; for it was determined, in the case of *the Earl of Lincoln v. Rolls* (a), that equitable and legal estates, as to implied revocations, stand upon the same footing, and are governed by the same rules.

For the defendant, the substance of the arguments was as follows:

1st Question—1. All the interest which Sir *John Gibbons* had in the manor of *Stanwell* at the time of the first mortgage certainly passed by the marriage settlement, to the lessor of the plaintiff; therefore, the freehold interest in the whole passed; but the copyhold interest did not pass, because that was not in Sir *John* at the time of the mortgage. The copyhold interest is a distinct permanent thing, taken notice of by the law, and was, in this case, in divers persons distinct from the lord, at the time of the mortgage. As soon as the mortgage became forfeited, Mrs. *Child* had an absolute estate in fee-simple in the manor, or freehold part; and Sir *John*, from that time, was only her tenant at will. Under those circumstances, the surrenders were made to him in fee. It is not true, when a tenant of a manor, either for a lesser estate, or in fee, takes, by surrender or forfeiture, a copyhold estate held of the manor, that the copyhold is thereby extinguished, and blended in the manor. In the first case, the qualified holder of the manor cannot extinguish it; for, if he lets it for years by indenture, it will still continue demiseable, as copyhold, by the reversioner. In the other case, *i. e.* where he is tenant in fee of the manor, he may extinguish the copyhold by granting it out by a deed or common-law conveyance, for, after that, it would lose an essential quality of copyhold, because it would not have continued demiseable by copy of court roll; but, in that case, till he does, the copyhold

[716]

(a) *Don. Proc.* T. 1695. *Show. Parl. Cases* 154. S. C. 1 *Eq. Ca.* 411, 412. 2 *Freem.* 202.

hold interest only continues suspended, and it may be granted out again as copyhold. If Sir *John Gibbons* had had no interest in the manor at the times of the surrenders to him; if, for instance, Mrs. *Child* had, before that time, taken possession of it by ejectment, he might have compelled her to admit him as tenant of the surrendered copyholds. Being tenant at will under her, at the time the copyhold interest was suspended; he could not admit himself; but, as soon as his tenancy at will should have ceased by a severance of the possession of the manor, and of the copyhold, he could have obliged her to admit him; and she would have been entitled to all the incidental services from him. This doctrine is clearly explained in *French's Case* (a), and in that of *Conebie v. Rusky* (b).—2. If these copyhold lands are not comprehended in the settlement, they must be considered as having passed by the will. There are certainly words sufficient for that purpose, viz. "All other my messuages, lands, hereditaments, and real estates." That general words like these will pass copyhold, as well as freehold, lands, has often been determined [1]; as in *Acherley v. Vernon* (c), and *Doe, Lessee of Pate, v. Davy* (d) [2] [†151].

1781.

DOE
against
POTT.

It

(a) B. R. M. 18 & 19 El. 4 Co. 31. a, b.

(b) B. R. E. 38 El. Cro. El. 459.

[1] The words of the statute of 27 Eliz. c. 4. § 2. against covinous and fraudulent conveyances, are, "lands, tenements, or other hereditaments whatsoever." In the *Law of N. Pr.* p. 108. Edition of 1775, a case is stated, where *Blencowe*, Justice, said that copyholds are not within those words; but, in *Doe, Lessee of Watson & others, v. Routledge*, B. R. M. 18 Geo. 3. [†152] Lord *Mansfield* said, that *dictum* was of no authority, and ought to be rejected; and *Aston*, Justice, said, he remembered a case where general words of that sort had been held to comprehend copyholds. The court, however, in that case, desired it might be understood, that they gave no decisive opinion on the point.

By 13 Eliz. c. 7. § 2. commissioners of bankrupt are authorized to dispose of "all the bankrupt's lands, tenements, or other hereditaments, as well copy or customary-hold, as freehold," by which it would seem, that the legisla-

ture, at that time, thought the general words as applicable to copyhold as to freehold.

(c) *Canc. M.* 10 Geo. 1. 9 Mod. 68. 10 Mod. 518. *Com.* 381.

(d) B. R. M. 15 Geo. 3.

[2] That case was as follows: *William Davy*, by his will, dated April 1767, and attested by three witnesses, after several general and specific devises, and legacies, made the following residuary devise: "And, as to all the rest and residue of my estate, of what nature, kind, or quality soever, I give and bequeath the same unto my brother *William Pate*, his heirs, executors, and administrators, according to the nature of the respective estates." On the sixteenth of May 1768, the testator purchased, and was admitted to, a copyhold estate, in fee, at *Hampstead*, and, at the same court, surrendered it to such uses as he should by his last will in writing, limit and appoint. On the 18th of November 1769, he made a codicil, attested by three witnesses, reciting, that he had made his will in 1767, by which he had devised

1781.

Doe
against
POTT.

It is true, these copyholds were not surrendered by Sir John Gibbons to the use of his will, but he was in a situation, with regard to them, at the time of making his will, which rendered that impossible; for he was tenant of the manor itself, under Mrs. Child, and could not surrender to himself. But it will not be denied, that the copyholds were *descendible*, and if so, they were *deviseable*; those terms being *convertible*, according to the doctrine in *Selwin v. Selwin* (a), as stated by Lord Mansfield, in delivering the opinion of the court in *Roe v. Griffiths* (b).

2d Question.—1. The argument drawn from the word “*incumbrances*,” in the devise of the freehold lands, loses any effect it might otherwise be imagined to have, when it is considered, that the object of the devise to the trustee was not solely to pay the debts; for the residue of the money arising from the sale is directed to be applied to the payment of the younger children’s fortunes, and that trust is not pretended to be yet satisfied. This supercedes the necessity of shewing what however seems pretty clear, *viz.* that “*other incumbrances*” must be construed to include bonds.—2. As to the supposed implied revocation, Sir John Gibbons, at the time of the will, had only an equitable estate; the legal interest was in Mrs. Child. In like manner, at his death, as well as during the intervening period of time, he had but an equitable estate. The legal title had indeed shifted from Mrs. Child to *Pickering*, but the equitable title had remained unaltered in the testator. Now, that a will is not revoked by the mere change of a trustee, was directly and solemnly decided in the court of *Chancery*, on a rehearing, and after full argument

vised certain fee-farm rents, and now by this codicil, he gave those rents to Mrs. Davy, for the term of her natural life, and gave her the house at *Hampstead* for life, &c. and some other specific legacies, and then followed this clause; “And I do ratify and confirm all and every the gifts, devises, and bequests, contained in my said will, except what I have hereby altered; and I do desire, that the present writing may be annexed to, accepted, and taken, as a codicil to my said will, to all intents and purposes.” At the time when the will was made, he had no copy-

hold lands. The question was, if those acquired afterwards passed by the will. The court held, that they did; that the words in the will were sufficient to pass copyhold property, and that the effect of the codicil was to operate as a republication, and to bring the will to the date of the codicil [25], and for this they relied on *Acherly v. Norton*, reported by *Comyns*, as an authority in point.

[†151] Since reported, *Corup.* 158.

(a) B. R. M. 1 Geo. 3. 2 Burr. 1131. 1 Blackst. 222. 251.

(b) B. R. M. 7 Geo. 3. 4 Burr. 1952. 1962. 1 Blackst. 605, 606.

[25] Copyhold lands purchased after the making of a will, do not pass by such will. *Spring v. Biles*, B. R.

M. 24 Geo. 3. 1 Term. Rep. 435. & Cam. Scacc.

argument at the bar, in a recent case of *Watts & others v. Fullarton* (c); the circumstances of which case were these: *William Watts*, by his will, dated the 11th of May 1762, devised all his real estate in *Berkshire*, to certain trustees, and their heirs, to the use of his first and second sons, and first and second daughters, successively, in strict settlement, with remainder to his own right heirs. On the 29th of February 1764, he made a codicil to this will, reciting, that, since the publication thereof, he had contracted with the Duke of *Kingston* for the purchase of certain lands in *Buckinghamshire*, and, thereby, directed the trustees and executors in his will, out of the residuum of his personal estate, to pay the purchase money, and, on payment thereof, he directed, that the said purchased premises should be conveyed, settled, and limited, to the same uses, and on the same trusts, as by his will he had limited, and declared, concerning his estate in *Berkshire*. Afterwards, the testator himself completed the purchase referred to in the codicil, and took a conveyance of the purchased premises, to certain trustees therein named, in fee, in trust for himself, and his heirs, soon after which he died. The bill was brought by the younger children, to have, (*inter alia*,) the trusts in the will and codicil carried into execution, as to the new purchased estate. The Master of the Rolls having omitted to give any directions as to that point, the case came on, by petition and appeal, before the Lord CHANCELLOR, and the question was, Whether the conveyance of the new purchased lands to the trustees, subsequent to the will and codicil, was not, *pro tanto*, a revocation thereof? The testator *Watts*, at the time of making the codicil, the thing being *in fieri*, was in the nature of a mortgagor, and the Duke of *Kingston* a trustee for him. Afterwards, before his death, the legal estate vested in the new trustees. Yet Lord BATHURST decreed, that there was no revocation, and that the trusts should be carried into execution [†153]; relying much on the general proposition laid down by Lord HARDWICKE, in *Parsons v. Freeman* (a), viz. "That, where a man has an equitable interest in fee, in an estate, and devises it, and afterwards makes a conveyance of the legal estate to the same uses, this is no revocation."—That case of *Watts v. Fullarton* is decisive, being indeed stronger than the present, for even the equitable interest had, there, been in some degree altered.

Lawrence, in reply, insisted; 1. With regard to the copyhold lands, that it was sufficient for his argument, that Sir *John Gibbons* was lord of the manor, in possession at

1781.

Doe
against
Patt.

[719]

(c) *Canc. T. 14 Geo. 3.*(a) *Canc. 9 Nov. 1751. 3. Atk. 741.*[†153] Vide *Greenhill v. Greenhill*, 749.
Canc. H. 1711. 2 Vern. 679.

1781.

DOE
against
POTT.

at the time of the surrender. That he meant to benefit the manor, not to keep the copyholds distinct. If that had been his intention, he would have purchased them in another person's name. He also contended, that though it was true that the settlement referred to the mortgage, yet, if all the words were taken together, there was enough to pass copyholds purchased after the mortgage, though they should be held not to be subject to the mortgage. But if they should not be thought by the court to pass by the settlement, still they could never be included in the will, since, after disposing of the reversion of the manors, and quitting that subject, it recites that he had made considerable purchases of *other* real estates, and then disposes of "all *other* his messuages, lands, &c." words clearly calculated to exclude every thing belonging to the manors. 2. As to the freehold lands, he said, the case of *Watts v. Fullarton* was contrary to that of *the Earl of Lincoln v. Rolls*, and seemed a very extraordinary determination; for that, at the time of the codicil, *Watts* had no interest in the lands afterwards purchased of the Duke of *Kingsfon*, and nothing but a mere claim.

Lord MANSFIELD said, that, in equity, they considered such a contract as that recited in the codicil in *Watts v. Fullarton*, as completed, so as to make the seller a trustee, and the buyer *cettui que trust*; that, if the parties had died before any conveyance, the heir of *Watts*, (had there been no devise,) would have taken the land, and the executors of the Duke of *Kingsfon*, the money. His Lordship then asked *Lawrence*, how the heir at law could maintain an ejectment for the freehold lands, as the legal interest was clearly in *Pickering*; to which he answered, that he conceived it to be now settled, that the title of a mere trustee shall never be set up to keep the *cettui que trust* out of possession.

[720]

The court took time to consider till this day, when Lord MANSFIELD delivered their opinion, as follows:

Lord MANSFIELD,—Except Mr. Justice BULLER,—who, for private reasons of connection with one of the parties, has declined giving any opinion, and has had no share in our deliberations,—we are all clear in the opinion I shall now deliver. This ejectment is brought to recover the possession of two denominations of land; 1. Certain copyhold or customary tenements held of the manor of *Stanwell*, which were surrendered to Sir *John Gibbons*, prior to the settlement on the marriage of his son, the present lessor of the plaintiff; and, 2. Certain freehold lands, which were purchased and mortgaged in fee, by Sir *John*, then, after the settlement, devised by will, and, after that, the mortgage upon them paid off, and a conveyance of them made by the mortgagee to a trustee. I will take them

them separately; because the questions concerning them are entirely different, and independent.

1781.

DOE
against
PORT.

1. As to the copyhold tenements, the facts, in substance, are shortly these:—(Here his Lordship stated the material part of the case, as far as concerned the copyholds, and said, he thought, under the word “manor,” all the consequences and incidents would have passed, which, in these, as in all the common dragnet conveyances, were specifically enumerated.)—The question, on this part of the case, is, whether these copyhold tenements go to Sir *William* as tenant for life under the settlement, or whether they pass by the will; and we are clearly of opinion that they must go to the uses of the settlement. To go by steps: After the mortgage, the mortgagee in fee had a right to the manor and every thing held of it as parcel thereof. In *notion of law*, the mortgagor was only tenant at will, or, at most, from year to year. He had the lowest estate possible. In *equity*, he was lord of the manor, subject to the charge upon it; but he could do nothing to weaken the security. In both views it is clear what he could do in consequence of the surrenders. He had the option, if he had been absolutely tenant in fee, either to continue the copyholds as parcel of the manor,—by granting them out again by copy of court roll, because the custom is not broken by their merely having continued in the lord's land, but they may, notwithstanding, be alledged to have been demised and demiseable, by copy of court roll, which is all that is necessary,—or to sever them from the manor, by any common-law conveyance, as a lease, &c. But the manor being mortgaged in fee, he could not sever them, because *that* would have diminished the security; for the mortgagee had a right to the services, quit-rents, escheats, forfeitures, and other casualties. If we consider *his* legal interest, being only tenant at will, he could not sever the copyholds. The argument is stronger on the settlement, for the surrenders had then been made, and all is included in the settlement, so that, after *that*, he could not sever, in respect of the settlement. The next consideration is, had Sir *John* any idea of severing the copyholds? Did he mean to do it by his will? It is plain, on the face of it, that he did not; for, after reciting the settlement, he devises only *the reversion* of the manors, and does not mention the customary lands. Then, he devises “all other, his messuages, lands, hereditaments, and real estates.” Therefore, *quâcunque viâ*, we are clearly of opinion, that Sir *William* is entitled to the copyhold tenements; because, 1. They were settled as part of the manor, and could not be severed by the will; and, 2. If they could have been severed by the will, *that* was not done.

[721]

1781.

Doe
against
Pott.

[722]

2. With regard to the freehold estate, the facts are as follow:—(His Lordship then gave an abridgment of the case as to what concerned the second question.)—These lands are claimed by the lessor of the plaintiff in this ejectment, as heir at law to his father. The objection to this is, that he cannot recover them in ejectment as heir at law, because, (independent of the devise,) by the lease and release of the first and second of *March* 1776, they were conveyed in fee to a trustee, and the legal estate is in such trustee. It is answered, that this is indeed, *prima facie*, true, but that it has been settled for years, that a mere trust estate shall not be set up against a *cettui que trust* [†154]; and, the conveyance to *Pickering* having operated as a revocation of the devise of these lands, he is a mere trustee for the heir at law. Now, in the first place, the rule only is, (and I hope it is so understood,) that the trust estate shall not be set up in an ejectment to defeat the *cettui que trust* in a *clear* case. In such a case, where the trust is perfectly clear and manifest, the rule stands upon strong and beneficial principles, because, in ejectment, the question is, who is entitled to the possession. But, if the trust is doubtful, a court of law will not decide upon it in an ejectment. It must be put into another way of enquiry. But, in the second place, there seems to be no doubt here, that the person having the legal estate is not a trustee for the heir at law. Sir *John Gibbons*, at the time of the devise, had merely the *equitable* fee in him. Mrs. *Child* was his trustee. Then, on payment of the mortgage money, she conveyed the legal estate in fee to *Pickering*, which was merely transferring it from one trustee for Sir *John* to another; and I know of no determination, or case, in which a bare change of a trustee has been held to revoke a will. On the contrary, Mr. *Wilson* cited a very strong case where it was held, that it does not. All revocations, which are not agreeable to the intention of the testator, are founded on artificial and absurd reasoning. The absurdity of Lord *Lincoln's* case is shocking. However, it is now law. But here, *quâcunque viâ datâ*, Sir *William* cannot recover these freehold lands; for, 1. The trust is at least doubtful, which is sufficient; but, 2. We think the will as to them is not revoked.

The *Posse* to be delivered to the plaintiff [1].

[†154] Vide *Goodtitle v. Knot*, B. 25 Geo. 3. 1 Term Rep. 758. n. (a). R. E. 14 Geo. 3. Cowp. 43. 46. *Lade* But, vide *Doe*, lessee of *Hodgkiss*, v. *Holford*, B. R. E. 3 Geo. 3. *Law of Staple*, B. R. M. 29 Geo. 3. 2 Term N. Pr. Ed. 1775. p. 110. *Butterfield v. Rep.* 684. Heath, B. R. H. 23 Geo. 3. *Doe*, [1] Because he was entitled to re- lessee of *Brislowe*, v. *Pegge*, B. R. E. cover part of the premises.

GRANT *against* ASTLE.

1781.

Tuesday,
16th June.

THIS was a writ of error, from the court of Common Pleas, on an action of *assumpsit* by *Astle*, as lord of the manor of *Great Tay* in the county of *Essex*, against *Grant*, for the fines assessed by the lord, on *Grant's* admission to eight different customary tenements. The declaration consisted of three counts. The first stated, that *Astle* was lord of the manor; That the eight tenements—(enumerating and describing them particularly, with their names, and the names of the different parts of which each consisted, where there were different parts of the same tenement with distinct names, and the number of acres with each tenement, or its different parts, by estimation contained)—were, and, for time immemorial, had been, parcel of the said manor, and customary tenements of the said manor, *demised and demiseable* by copy of court roll of the said manor, by the * lord of the said manor, or by his steward or deputy steward of the courts of the same manor for the time being, to any person or persons entitled to take the same in fee-simple or otherwise, at the will of the lord, according to the custom of the said manor; and that within the manor there was a custom, that every customary tenant, upon his admission to any customary tenement, parcel of the manor, by the lord or his steward, or deputy steward, should pay to the lord, a reasonable sum, to be assessed by him, or his steward, or deputy steward, for a fine for such his admission to such customary tenement: It then stated eight several admissions of *Grant*, by the deputy steward, to each of the eight customary tenements respectively; That the first was of a large annual value, viz. of the annual value of 23*l.* 8*s.* 9*d.* and that *Astle*, at the time of the admission of *Grant* to this first tenement, did assess or appoint the sum of 46*l.* 17*s.* 6*d.* as and for a fine, for his admission to that tenement, to be paid by *Grant* to *Astle*, at the messuage called the *Guildhall*, in *Great Tay* aforesaid, being the place where the courts for the manor were usually holden, at 12 o'clock, A. M. on *Thursday*, the 20th of *August*, then next ensuing; That the said 46*l.* 17*s.* 6*d.* was a reasonable sum of money to have been paid to *Astle* by *Grant*, for his admission to that tenement; and then an *assumpsit* by *Grant* for the 46*l.* 17*s.* 6*d.*; Then similar separate allegations with regard to the several fines of 4*l.* 10*s.*; 2*l.* 12*s.* 6*d.*; 11*l.* 18*s.* 0*d.*; 3*l.* 0*s.* 0*d.*; 1*l.* 10*s.* 0*d.*; 7*l.* 10*s.* 0*d.*; and 24*l.* respectively, for the seven other customary tenements [1]. The second count stated, That, “where-

One fine cannot be assessed on the admission to several copyhold tenements.—If any count in the declaration state one fine, although the other state several, and there are entire damages, and judgment for the plaintiff, it is error.—A court of error may award a *venire de novo*.

*[723]

U 2

as

[1] Some of the counsel spoke of errors, as consisting of eight counts, what is here called the first count, and there being eight separate *assumpsits* was so described in the assignment of alleged.

1781.

GRANT
against
ASTLE.

[724]

as *Grant*, afterwards, to wit, &c. was indebted to *Astle* in the further sum of 98*l.* 18*s.* 4*d.* for a certain other fine due and of right payable from the said *Grant* to the said *Astle*, as lord of the manor of *Great Tay*, for the said *Astle*'s admission of the said *Grant*, at his special instance and request, to certain other customary tenements, parcels of the said manor, to be held by the said *Grant* and his heirs, of the lord of the said manor, at the will of the lord, according to the custom of the said manor, by certain rents, services, and customs, therefore formerly due, and of right accustomed, &c. and then an *assumpsit* for the said last-mentioned sum. The third count was for 100*l.* paid, laid out, and expended. *Grant* pleaded the general issue, paying, at the same time, 84*l.* 5*s.* 8*d.* into court; and the cause came on to be tried, before *ASHHURST*, *Justice*, at the *Affizes* for the county of *Essex*, when a general verdict was found for *Astle*, with 98*l.* 18*s.* 4*d.* damages, subject to the opinion of the court of *Common Pleas* on a case reserved [2]. That court having decided in favour of *Astle*,

[2] The case reserved stated, That *Astle* was lord of the said manor of which the tenements mentioned in the declaration were parcel, and that the same were held of *Astle*, as lord of the said manor, by copy of court-roll, at the will of the lord, according to the custom of the said manor, and that the fine was arbitrary; That *Grant* had craved admission, on the death of his father, and was accordingly admitted, in fee, to all the said copyhold tenements, upon which admission a fine of 98*l.* 18*s.* 4*d.* was assessed; That the said fine of 98*l.* 18*s.* 4*d.* appeared to be two years improved value of the said tenements to which *Grant* was admitted, after deducting 2*l.* 19*s.* 8*d.* for the quit-rents, which were 1*l.* 9*s.* 10*d.* a year; That *Astle* had not deducted any thing out of the said fine for land-tax; That *Grant* had paid 84*l.* 5*s.* 8*d.* into court, upon the common rule.

The question stated, upon this case, was, whether the lord of the said manor was bound to allow any sum of money for land-tax, out of the said fine. If he was, a nonsuit was to be entered; if not, the verdict to stand.

After the case had been argued at the bar, Lord *Loughborough* delivered the opinion of the court, to the following effect:

Lord *Loughborough*,—“This question was truly considered as of great concern to the public at large. It has undergone a very deliberate examination, and we are all of opinion, that the lord of the manor is not bound to make any deduction, for the land-tax, out of a fine due for admission on a descent, which is the present case.

“The grounds which led us to this determination lie in a very narrow compass.

“In the first place, the land-tax is annual, and, however probable its continuance may be, there can be no legal presumption as to the future intentions of the legislature, and there can be no deduction, by anticipation, of an uncertain future burthen.

“In the second place, the tax, tho’ commonly called a tax upon land, is not, in its nature, a charge upon the land. It is a tax upon the faculties of men, estimated, first, according to their personal estate, secondly, by the offices they hold, and lastly, by the land in their occupation. The land is but the measure by which the faculties of the person taxed are estimated; and where it is intended by the legislature that the burthen should not ultimately rest upon the person charged, a power of deducting is given him by the act;

Astle, he remitted the 8*l.* 5*s.* 8*d.* upon the record, and took judgment for the difference. *Grant* then brought this writ of error, and, (besides several on the first count, which, not having been insisted on, I omit,) assigned the following errors on the second count. 1. That no title

1781.

GRANT
against
ASTLE.

was

as in the case of rents, and other certain outgoings. But no deduction is allowed for fines which are uncertain.

'In the *last* place, this claim being new, and there being no precedent nor instance to support it, the usage of almost a century is a strong proof, that no such deduction ought to be made, and amounts to a contemporary and permanent exposition of the land-tax acts, in favour of the lord.

'These are the reasons which have weighed in the opinion of the court, to determine this case in the manner I have stated.

'But the subject having led to much curious and interesting enquiry into the nature of copyhold estates, and the progressive advancement of the rights of the tenant, I wish to state a few circumstances that have occurred to my observation; for the inaccuracies of which I only am answerable. I do it in order to excite the investigation of persons more able and more diligent; particularly of those who are acquainted with the antiquities of this country, as well as its laws: and I wish it may have the effect of engaging the attention of the plaintiff in the present cause, who, I am sure, is very able to make an enquiry of the nature I am going to point out.

'Copyhold tenures are agreed, by all writers, to be more ancient than the *Norman* government. In some of the most approved authors, the copyhold tenure of land is derived from the state of *villennage*, which now happily forms a very obscure title in the law. It is supposed, that all copyholders were originally villeins, and that, by the mitigation of villennage, and the progress of enfranchisement, the estate grew, by degrees, to be more free and permanent, till it came into the condition of a copyhold.

'I cannot help doubting whether

that deduction is not founded in mistake. The circumstance which first led me to entertain the doubt is, that, in those parts of *Germany* from whence the *Saxons* migrated into *England*, there exists, at this day, a species of tenure exactly the same with our copyhold estates, and that there exists likewise, at this day, a compleat state of *villennage*; so that both stand together, and are not one tenure growing out of another, and, by degrees, assuming its place. In *East Friesland*, the dutchy of *Brunswick*, and other northern parts of *Germany*, there are villeins in gross, and villeins regardant, with the same rigour which our law formerly knew. There are also copyhold tenants, who are freemen, but whose estates are alienable only by licence, and are transmissible by descent; and, in both instances, they must pass through the courts of the lord. Nay, in the ancient seat of the *Anglo-Saxons*, there exists, at this day, that peculiar descent to the youngest son, which we call *Borough English*; of which the name shews the original.

'What I have stated I found in a very accurate treatise of *German* law by *Selchow*, one of the professors of the university of *Göttingen*, entitled "*Elementa Juris privati Germanici*."

'This seems sufficient to negative the idea that copyholders sprang out of villeins. In *England*, villennage has ceased, and copyholds remain; but here, as in other countries, they both prevailed at the same time.

'It is not difficult to conceive, that whenever agriculture became an object of respect in the northern and western parts of *Europe*, those who applied themselves to the cultivation of land, though inferior in point of dignity, would be equal in point of freedom, to those whose only profession was arms. The copyhold tenants were husbandmen;

1781.

GRANT
against
ASTLE.

was alledged, nor did appear, to be vested in *Astle*, to entitle him to a fine upon the admission of *Grant*; whereas, by the law of the land, a title ought to have been stated, whereby he claimed the said fine. 2. That no custom or prescription was therein stated or alleged, whereby such a fine as was thereby claimed could arise or become payable.

3. That

husbandmen; their persons were free; and, in that respect, they were as much above the villeins, as, in point of consequence, they were inferior, in a military age, to those who had arms in their hands. Their lands were held of a lord who could defend them, and who, in return for that defence, was entitled to certain profits and advantages, founded upon paction express or presumed.

A fine to be paid on the change of a tenant is almost a constant incident of a copyhold estate, and it does not seem to have been long before the end of the reign of Queen *Elizabeth*, that courts of law interposed to moderate the exercise of the lord's right to a fine, where the custom had left the amount of it uncertain; for it is pretty remarkable, that a question on this subject was depending in the 36th & 37th of Queen *Elizabeth*, in the court of *King's Bench*, and in this court, at the same time: you will find it in 1 *Rolle's Abr.* 507. and in the contemporary reporters. The question was this; under what circumstances a refusal to pay a fine should amount, in a court of law, to a forfeiture of the copyhold estate.

It was contended, upon the part of the lord, that the mere non-payment of the fine assessed would amount to a forfeiture.

That proposition appeared too strong, even in a court of law; however, the court of *King's Bench*, in the 36th of *Elizabeth*, held, that, after the demand of a fine by the lord, and the refusal of the tenant to pay, though the fine should be unreasonable, the estate should be forfeited.

This court, a term or two afterwards, in the case of *Jackman v. Hoddesdon*, reported in *Cro. Eliz.* 351. held that, in such case, there was no forfeiture. The court of *King's Bench*,

(as has been just stated,) had held the contrary, but the opinion of this court prevailed; and, in the 43d of *Elizabeth*, in the case of *Hobart v. Hammond*, reported in 4 *Co.* 27. b. the court of *King's Bench*, referring to the case of *Jackman v. Hoddesdon*, in the *Common Pleas*, varied their idea, and held, that the refusal to pay an unreasonable fine was no forfeiture of the estate. From the manner in which the report of that case is stated, and the anxiety with which the Judges support the proposition, one would be apt to conclude it had not been of great antiquity.

A few years afterwards, in the 6th of *King James*, in *Willow's Case*, 13 *Co.* 1. this point again occurred, and the law was not then taken to be so settled, as for the court simply to say, "the point is so," but the report states a great deal of reasoning and argument to support the position, that the Judges not only might, but ought, either upon the facts appearing upon a demurrer, or upon evidence to go to a jury, to determine, what was a reasonable fine; and, in that case, the court held, that two years value was an unreasonable fine.

Thus then the matter rested; the fine was to be assessed by the lord; and, whether it was reasonable or unreasonable was a question for the consideration of the court and jury; and it would obviously be subject to much fluctuation and uncertainty. To prove upon a trial, the annual improved value of land, and then to calculate how much of that value should be paid for a fine, was likely to be attended with so much dissatisfaction, that recourse would frequently be had to the court of *Chancery*, which had always relieved against the forfeiture, and taken upon itself, without a jury, to determine what should be a reasonable fine.

Lord

3. That it appeared, "that one gross sum had been assessed, 1781.
 "and was claimed as a fine for divers distinct and separate
 "customary tenements; whereas, by the law of the land, GRANT
 "separate and distinct fines ought to be set and assessed 'against
 "upon each several and respective tenement [†155]." ASTLE.

Wood,

'Lord Keeper Coventry, in the 5th of Charles I. and again, in the 12th of the same reign, (1 *Chan. Rep.* 18. or 33. (a), and *ibid.* 51. or 96. (b), held, that one year's improved value was a reasonable fine—guarding the decree—that one year's value should not be counted a fine certain, but referable to the discretion of the court whether it was reasonable, and that the payment was then directed because it was reasonable.

'In the 20th of Charles II. in the year 1677, Lord Nottingham, in the case in 2 *Rep. in Chan.* 135. (c) held, that two years value was a reasonable fine; and, at the time of this determination, in 1677, two years value was not a much higher payment, than one year's value had been at the time of Lord Coventry's determination. The interest of money had been reduced, and, from that and other causes, the value of land had risen. One year's value might be nearly as large as an aliquot part of the selling price of land in the 5th of Charles I. as two years value at the time of Lord Nottingham's determination. From that time to the present, the idea of two years value being a reasonable fine, in the case of a fine arbitrary, (or, in the more proper phrase, *arbitrable* (d),) has prevailed uniformly, and the adhering to this rule has been a matter of very great convenience, though it cannot be said to be a matter of strict justice.

'Two years value, the interest of money being six per cent. as at the time of Lord Nottingham's determination, is a much larger proportion of the selling price of a copyhold estate, than the same number of years purchase, the interest of money being at

five, and four per cent. But to follow the variations of price, would create confusion in this property, would occasion a depreciation of it, and is not the true interest of the copyholder. Public convenience, therefore, that great source of law and justice, has established the authority of the rule laid down by Lord Nottingham; and, it is to be observed, that the decision was not above eighteen years prior to the first land-tax act. From that time to the present hour, not an instance can be found, where there has ever been a deduction from the two years value, (then fixed as the utmost amount of a fine,) upon account of the land-tax.

'It seems, therefore, to me, much better for the interest of copyhold tenants, and for the public advantage, as there is a great deal of that property in the kingdom, that the fine to be paid upon the renewal of a copyhold estate should be strictly kept to that sum which has subsisted now above a century, namely, two years improved value, without any deduction except for quit-rents, which can hardly be called a deduction, for the lord must allow that which he has received, or is to receive.'

[†155] The following case has been since decided, *B. R. H.* 24 *Geo.*

3.

WHITEFIELD v. HUNT.

Assumpsit, for copyhold fines. The declaration contained, (besides several special counts, in the common form, for so many fines assessed on several tenements,) a general *indebitatus assumpsit*, as follows:

And whereas also the said defendant, afterwards, &c. being a tenant of divers other customary tenements, parcel of the said manor of, &c. was indebted

(a) *Middleton v. Jackson.*

(b) *Popham v. Lancaster.*

(c) *Morgan v. Scudmore.*

(d) *Cro. El.* 351.

1781.

GRANT
against
ASTLEY.

[728]

Wood, in support of the demurrer.—*Law*, for the plaintiff.

Wood insisted, that the second count was bad, and that, if so, as the verdict was general, the judgment must be reversed.—1. In order to support this count, he said, a great many circumstances, essential to entitle the plaintiff to maintain his action, must be presumed and supplied by intendment. 1. There is no allegation of any custom to take fines, and, without such special custom, no fine is payable. 2. It is not alleged, that the fine was reasonable. 3. It is not stated how it was assessed. 4. Nor how appointed to be paid. 5. Nor that the defendant had notice before the action brought. 6. It is not sufficiently shewn, that the tenements are copyhold, for they are not alleged to have been *demised and demiseable* from time immemorial, &c. They are, indeed, called customary, but *that* they may be, and yet not copyhold, nor subject to the payment of fines upon admissions. It is not denied, that *indebitatus assumpsit* will lie for a copyhold fine [3] [p. 728], but all the circumstances just mentioned are necessary to raise the *assumpsit*, and there is no case in which the court has presumed so many things, even after verdict.—Upon this head of objection he cited *Moore v. Lewis* (a), which was an action of *assumpsit*, and the declaration contained two counts; in the first, the consideration of the *assumpsit* was, that the plaintiff had done

indebted to the said plaintiff, then and still being lord of the said manor in 781. 5s. for reasonable fines due and payable by the said defendant to the said plaintiff, for and on the admission of her the said defendant, according to the usage of the said manor, into the said last-mentioned customary tenements, with the appurtenances, to hold to her, her heirs and assigns, for ever, of the lord of the said manor, according to the custom of the said manor, by the rents, customs, and services, for the same customary tenement formerly due, and of right accustomed, and, being so indebted, &c.

The defendant demurred specially; and assigned for causes of demurrer; That it was not alleged, that the tenements were, from time immemorial, customary tenements demiseable, &c.; That it was not alleged, that, within the said manor, there had been a custom to pay a fine on admission; That it was not shewn, by whom the admission was made, nor that any assignment was

made; That the custom of the manor was not set out, nor how many fines were due, and what each fine amounted to, nor how the same were assessed, nor what fine was due for each tenement.

Touchet, for the plaintiff.—*Wood*, for the defendant.

Buller, Justice, said the question was only, whether a *general indebitatus assumpsit* will lie for copyhold fines, and that it had been expressly decided, that it will, in a case of *The Duke of Devonshire v. Craddock*, C. B. H. 27 Geo. 2.

Judgment for the plaintiff.

[3] It was solemnly decided that *assumpsit* will lie, in the case of *Shuttleworth v. Garnet*, cited *infra*, p. 729, by the opinion of *Dolben*, *Gregory*, and *Eyres*, Justices, against that of *Hol*, Chief Justice.

[83] So, a *general indebitatus assumpsit* will lie for tolls. B. R. H. 27 Geo. 3. 1 Term Rep. 616.

(a) B. R. E. 21 Car. 2. 1 Vent. 27.

done the defendant *multum et gratissimum beneficium*, in the second, that he had done him *multa beneficia*. There was a general verdict; and motion in arrest of judgment, because neither of the considerations were sufficient, especially not the last, for that some particular service ought to have been alleged; and the court held clearly, that, nothing being particularly expressed in the consideration of the second promise, and entire damages being given, the plaintiff could not have judgment. He also cited *Elkin v. Wastell* (b), where, upon a writ of error, the court agreed, that land could not be intended to be copyhold, but must be so alleged.—But, 2. He contended, that there was another objection, which was decisive, viz. that assigned as the third error on the second count. He said he took it to be quite settled, that there cannot be one gross fine for several distinct tenements; and it was impossible to read this count and not to see that the fine was for divers tenements. The words are “a certain other fine,” and “certain other customary tenements;” not “a certain other customary tenement.” This must mean more than one tenement. It goes on farther, and states them to be held by “certain rents, services, and customs;” and, if there is a plurality of rents and services, there must also be a plurality of holdings. In the first count, the words customary tenements, are manifestly used to express several distinct tenements, and there cannot be a better way of explaining the meaning of one part of the declaration, than by comparing it with the other part.—On this head, he relied on *Hobart v. Hammond* (c), where it was expressly resolved, that, when a copyholder has several lands held by several services, by copy, there the lord ought to assess and demand the fines severally for every parcel which is so severally held; *Taverner v. Cromwell* (d); and *Hitch v. Wallis*, before BLACKSTONE, Justice, at the Lent Assizes for the county of Cambridge, 17 Geo. 3.

Lord MANSFIELD desired Law to confine himself to Wood's second objection.

Upon that point, Law said, it ought to be considered, that, here, the objection was made after verdict, not on a demurrer, or at the trial, as in the case of *Hitch v. Wallis*, in which case the plaintiff would have given evidence of one gross consolidated fine for divers tenements. The court in this case will give to the word “tenements,” such a sense, if possible, as will support, rather than overturn the count. “Tenements,” as defined in *Coke Littleton* (e), means, any “corporate inheritances,” or any “inheritances

1781.

GRANT
against
ASTLE.

[729]

(b) B. R. M. 14 Jac. 1. 3 Bulstr. 230. 779. by the name of *Dalton v. Hammond*.

(c) B. R. M. 42 Et 43 El. 4 Co. 27. b. S. C. Moore, 622. and Cro. El. (d) B. R. T. 26 El. 4 Co. 27. a. (e) Co. Litt. 19. b.

1781.

GRANT
against
ASTLE.

[730]

"inheritances issuing out of those." It may stand for *messuages and lands*, and, if you translate the sign into the thing, the declaration will run, "certain other custom-ary messuages and lands," which would certainly be sufficient, as the fine may be supposed to have been assessed for one copyhold estate composed of different parts, as houses, arable grounds, &c. As to the words, "rents, services, &c." in the plural, one copyhold estate may be held by several different sorts of rents, and services, to be paid, and performed, at different times. In *Shuttleworth v. Garnet*, as reported in several different books (b), the declaration was on a general *indebitatus assumpsit* for a fine, payable on the death of every lord, and assessed on the defendant, as tenant *quorundam custumariorum tenementorum* (c), and, upon a motion in arrest of judgment, it was determined that the action lay [3] [4]. So, in the case of *The Mayor of Exeter v. Trimlet* (d), where—on a general demurrer to an action of *assumpsit* for petty customs, in which the declaration contained two counts, the first setting out a prescriptive right, and the second being a general *indebitatus assumpsit*, for a certain sum due for petty customs—the demurrer was over-ruled, and WILLES, Chief Justice, in delivering the judgment of the court, said they gave no positive opinion as to the second count, but inclined to think it was well enough upon a general demurrer, and that, if the defendant had pleaded *non assumpsit*, the plaintiff, at the trial, would have been obliged to shew his right to the petty customs. Surely the plaintiff, here, is entitled to, at least, as much advantage after verdict, whatever might have been the case upon a special demurrer. There, it is said, the plaintiff must have proved his right. Here, the court will presume, that the right was proved, and no Judge at *Nisi Prius* would have suffered evidence to be produced of one general consolidated fine for several copyholds: It must be intended that the proof was either of one estate, or of several assessments. If the court should think "tenements" in the plural, cannot be interpreted to mean one estate composed of different parts, they will reject the letter s, rather than turn the plaintiff round. The word "parcel" may assist to shew that only one copyhold was meant.

Lord MANSFIELD,—I have exceedingly lamented, that ever so inconvenient and ill-founded a rule should have been established, as that, where there are several counts,

entire

(b) B. R. M. 1 W. & M. Carth. 90.
3 Mod. 239. 3 Lev. 261. 1 Show. 35.
Comb. 151.

(c) Carth. 91.

[3] The present question does not appear to have been made in that case;

the only point argued being whether *assumpsit* was a proper form of action. *Vide supra*; p. 728. Note (3).

[4] *Supra*, 728. Note [4].

(d) C. B. T. 32 & 33 Geo. 2. 2 Wilf. 95.

entire damages, and one count is bad, and the others not, this shall be fatal; upon the fictitious reasoning, that the jury has assessed damages on all, although, they in truth, never thought of the different counts, but the verdict was so taken, from the inadvertence of counsel in a hurry of *Nisi Prius*. And, what makes this rule appear more absurd, is, that it does not hold in the case of criminal prosecutions; for, when there is a general verdict of guilty, on an indictment consisting of several counts, if any one of them is good that is held to be sufficient [†156]. But, in civil cases, the rule is now settled, and we have gone as far as we can, by allowing verdicts in such cases to be amended by the Judge's notes (a). That might have been done, in this instance, in an earlier stage of the proceeding, but cannot now after judgment.

1781.

GRANT
against
ASTLE.

[731]

BULLER, *Justice*.—The court may grant a *venire de novo*. A good cause of action is shewn in the first count; and that it is true, appears by the verdict; but the plaintiff has also had damages assessed to him on a count in which he has not shewn any cause of action. The court, under these circumstances, may send the case back to have damages assessed only on that count, on which, in point of law, he is entitled to recover.

The court then said, there was no doubt but a *venire de novo* might be granted by a court of error: That it had been done by the House of Lords; and was not a new practice, for, upon an enquiry made by this court on a late case from Ireland, a great many instances had been found.

A *venire de novo* awarded [4] [157].

[†156] *Vide Regina v. Ingram, H.*
10 Ann. 1 Salk. 384.

(a) *Eddowes v. Hopkins, B. R. E.*
20 Geo. 3. *supra*, p. 376.

[4] The cause came on to be tried, on the *venire de novo*, before *Ashurst*, Justice, at the *Lein* Assizes for the county of *Essex*, 22 Geo. 3. when the jury, upon the evidence, thought that the sum of 46*l.* 17*s.* 6*d.* stated to have been assessed as a fine on the admission to the first of the eight tenements, exceeded two years' value, and that the fine ought only to have been 46*l.* 4*s.* 3*d.* *Ashurst*, Justice, was of opinion, that the plaintiff could not have a verdict for that smaller sum, but must recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counsel, however, insisting strongly that he might recover according to whatever the jury should find the two years' value to be, a ver-

dict was found for the plaintiff, by consent, on that ground, with liberty to enter the verdict for the defendant, if the court should think the plaintiff was bound to prove the exact sum laid.

In *Easter Term*, 22 Geo. 3. this question was argued, by *Rous*, *Erskine*, *B. Hunter*, and *Law*, for the plaintiff, (*Astle*), and *Peckham* and *Mingay*, for the defendant; and, in the same term on *Saturday*, the 11th of *May*, Lord *Mansfield* delivered the opinion of the court in favour of the defendant, as follows.

Lord *Mansfield*.—The only count in the declaration which is now material, is for several fines for admission to several copyholds; the declaration states, a custom for every customary tenant to pay a reasonable fine upon his admission, to be assessed by the lord, &c.; that the first tenement was of a large annual value, *viz.* of the annual value

1781.

GRANT
against
ASTLE.

value of 23*l.* 8*s.* 9*d.*; that the lord had assessed 46*l.* 17*s.* 6*d.* as a fine for the defendant's admission to this tenement, and that this sum was a reasonable fine. On the evidence, it appeared, that the fine should have been only 46*l.* 4*s.* 3*d.* that being the full amount of two years value; and the question now is, whether the plaintiff can, in this case, recover a smaller sum than the fine assessed. Two things are necessary parts of this custom: 1. The fine must be *assessed*: 2. It must be *reasonable*. The lord says, in his declaration, that he has *assessed* 46*l.* 17*s.* 6*d.* for a fine, and that this sum was *reasonable*, and brings his action for that precise sum. The question for the jury was, whether 46*l.* 17*s.* 6*d.* was a reasonable fine, and they found it was not, therefore, the plaintiff is not entitled to recover. He has not assessed two years' value, but a precise gross sum; and by what rule he went in assessing that sum does not appear upon the record. It is true, he has averred, that the estate is of a large yearly value,—*viz.* of the yearly value of 23*l.* 8*s.* 9*d.*—but that is no averment of what the yearly

[732] value really is. And the averment in this case is totally immaterial. It would have been enough if the plaintiff had stated, that he had assessed the sum of 46*l.* 17*s.* 6*d.* as a fine, and that such sum was reasonable; and it would *then* have been matter of evidence, just as it was on *this record*, whether the sum assessed exceeded two years' value or not, because that is the established criterion whether it be reasonable or not. In the present case the duty is numerically certain, for it is not assessed with re-

lation, and in proportion, to the annual value, but is fixed at a gross sum. The only case on this precise subject is *Titus v. Perkins* (a), which is reported in *Skinner* (b), *Carthew* (c), *Levinz* (d), and 3 *Modern* (e). The Chief Justice, there, says, "If the lord demand more than he ought, he may make his demand *de novo*, for the Judge, in case of a greater demand than is due, ought not to adjudge as much as is due to the lord, and bar him for the residue, but ought to adjudge against him for the whole, and that his entry was tortious, if he had entered, and put him to a new demand (f)." This goes to the demand itself, and is not confined to the case of a forfeiture, and there is no such distinction made in that case—(which had been insisted on at the bar.)—The *gift* and foundation of every action must be proved as laid in the declaration. This action is for a certain precise sum, and, under the circumstances of the case, it could not be brought in any other way. The cases cited for the plaintiff,—*viz.* of debt on a foreign judgment (g); or against a tenant for *double the value of the land*, when he holds over under the statute of 4 *Geo.* 2. c. 28. (h); or for *treble the value* for not setting out tithes, under the statute of *Edw.* 6. (i); or of *assumpsit* for a total loss on a policy of insurance, when there has been only a partial loss (k);—are not at all applicable to the present case; for, in all of those, the *gift* of the action is supported, and a case proved consistent with the declaration, those actions being not for a precise sum, but for a sum in proportion to what the jury shall find to be the value or the damage. We give no opinion, whether the lord might not have assessed a fine for two years' value, and made

(a) *C. B. H.* 1 & 2 *Jac.* 2.(b) *Skin.* 247.(c) *Carth.* 12.(d) 3 *Lev.* 249. 255.(e) 3 *Mod.* 132. Reported also in *Comberb.* 43.(f) *Skin.* 249.(g) *Walker v. Witter*, *M.* 19 *Geo.* 3. *supra*, p. 1.(h) *Vide Doe v. Jackson*, *E.* 19 *Geo.* 3, *supra*, p. 175.(i) 2 & 3 *Edw.* 6. c. 13.(k) *Gardiner v. Crofdale*, *B. R. H.* 33 *Geo.* 2. 2 *Burr.* 904. 1 *Blackst.* 198.

made that solely the foundation of his declaration. In *Titus v. Perkins*, a custom to have a year's value, generally, for a fine, was held to be good. But however that might be, it is very clear that the evidence here did not support the declaration, for the plaintiff has no right to any thing but the sum assessed; the duty arises upon the assessment, and *that*, by the evidence, is proved to have been illegal, and void. Therefore, the case stands as if no assessment had ever been made, and consequently, the plaintiff's right to demand a fine is not yet complete. Therefore, we are all of opinion with the defendant.

There was, accordingly, judgment for the defendant, because, as the fine for the first tenement was to be deducted from the damages, he had paid more into court than the plaintiff was entitled to recover.

[†157] *Vide Harwood v. Goodright*, B. R. T. 14 Geo. 3. Cowp. 87. 89. 91.

Qu. therefore, as to this point in the case of *Street v. Hopkinson*, B. R. M. 10 Geo. 2. 2 Str. 1055. In the *Mayor of Shrewsbury v. Kynaston*, Dom. Proc.

31st March 1737, 2 Str. 1051, 4 Br. Cases in Parl. 171. on a writ of error from B. R. the House reversed the judgment, and ordered the court of B. R. to award a *venire de novo*. In *Trevor v. Wall*, B. R. E. 26 Geo. 3. 1 Term Rep. 151. the court said there was no instance of a court of error granting a *venire de novo*, when the proceedings had originated in an inferior court. But where they originated in a court of great sessions in *Wales*, a *venire de novo*, was granted in the case of *Davies v. Pierce*, B. R. M. 28 Geo. 3. 2 Term Rep. 125. *Vide Galbraith v. Neville*, *supra* p. 6. Note [†2.]

1781.

GRANT
against
ASTLE.

EDEN and Another against PARKISON.

Tuesday,
26th June.

THE plaintiffs insured the ship the *Tonge Herman Hiddinga* and her cargo, "at and from *L'Orient* to *Rotterdam*; warranted a neutral ship and neutral property." The ship being captured in the course of her voyage by some *English* men of war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating, in their declaration, that the defendant subscribed the policy on the 28th of *November 1780, and averring, that the ship and cargo were, at that time, neutral property. The trial came on before Lord MANFIELD, at Guildhall, at the sittings after last *Easter Term*, when a verdict was found for the plaintiffs, subject to the opinion of the court, on a case which set forth, (as far as is material,) as follows:

The ship in question sailed from *L'Orient* on the voyage insured on the 11th of December 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of December 1780, on which day hostilities having commenced between the *English* and the *Dutch*, the *Dutch* ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of December 1780, and condemned

Under a warranty in a policy of insurance, that the ship and cargo are neutral property, it is sufficient that they are neutral when the risk commences.

* [733]

1781. as lawful prize, in the Admiralty court, on the 19th February 1781.

EDEN
against
PARKISON.

Smith, for the plaintiffs,—*Howorth*, for the defendant.
For the plaintiffs, it was contended, that the warranty was complied with by the neutrality of the ship and cargo at the time when the voyage commenced. It is a general principle, laid down by BLACKSTONE, *Justice*, in his Commentaries, "That a warranty can only reach to things being at the time of the warranty made, and not to things in future; as that a horse is found at the buying him, not that he will be found two years hence (a)." In the case of *Woolmer v. Muilman* (b), where the warranty was in the same words as here, the judgment of the court was for the defendant, because the ship and goods were not neutral from the first [1]. There was no fraud upon the defendant in this case. The insurer is to inform himself "of the probability of safety from the continuance of peace;" as was laid down by Lord MANSFIELD in the case of *Carter v. Boehm* (c). If indeed the property had ceased to be neutral by the act of the party himself, the case would have been different. But he is not answerable for the consequences of a war breaking out during the voyage. To make him so, express words ought to have been used; otherwise the construction is to be in the largest and most advantageous way for the insured, according to the principle of the decision in the case of *Gordon v. Morley* (d). The plaintiffs were ready to have proved, at the trial, that the premium, at the time of this insurance, would have been the same if the warranty had been "*Dutch property*," instead of "*neutral property*."

For the defendant, it was said, that this was a new question, and called for peculiar attention, as it would affect a great deal of property. It is certainly a question of construction upon the face of the policy; but, both from the words, and from the nature of the subject, it must be interpreted to mean a warranty co-extensive with the voyage. It is admitted by the argument on the other side, that, if

(a) 3 Blackst. Comm. 165.

(b) B. R. T. 3 Geo. 3. 3 Burr. 1419. 1 Blackst. 427.

[1] It does not appear very distinctly from the state of that case in 3 Burr. that the ship and goods were not neutral at the time of the contract, or of the sailing. It is only said, "The ship, at and before the time she was lost, was not neutral property, as warranted by the policy, (3 Burr. 1410.)" It may be collected, however, upon taking Sir James Burrow's account of the case, and Mr. Justice

Blackstone's together, that they were not neutral at the time of the contract.

The point there made, as appears from Blackstone, was that the warranty was tantamount to a warranty free from capture, and that, the loss having happened by foundering at sea, was not within the meaning of the warranty. But the court held, that, as the warranty was false, it was no contract.

(c) B. R. E. 6 Geo. 3. 3 Burr. 1905. 1910. Blackst. 593, 594.

(d) N. Pr. H. 20 Geo. 2. 2 Str. 1265.

1781.

EDEN
against
PARKINSON.

[735]

the neutrality had ceased before the ship sailed, the under-writers would not have been liable. But what expression of intention is there, that the warranty should not extend throughout? There are no restraining words. The sense is the same as if the policy had run, "warranted neutral ship, and neutral property at *L'Orient* and from *L'Orient* to *Rotterdam*." If the words were to be thought equivocal, yet the nature of the thing speaks in favour of this construction. The merchant proposes to insure the ship and cargo: Upon this the under-writer requires a description of the subject-matter of the insurance: The merchant answers, "I warrant it neutral." This puts an end to all enquiry about the country,—whether *Dutch*, *Swedish*, *Norwegian*, &c. Surely, if it had been mentioned that the property was *Dutch*, the under-writers would have insisted on a much higher premium, for there was, at the time of the insurance, an universal rumour of a war between this country and *Holland*. At the trial, this was compared to the case of a warranty to carry a stipulated number of men, or so many guns. But those instances do not resemble this. If guns are thrown overboard to save the ship in a storm, *that* is a circumstance arising out of the very risk insured against, viz. sea hazard; and, if some of the crew die, it cannot be supposed that the insured meant to undertake that men should be immortal. In the case of *Lilly v Ewer* (e), the warranty was "to sail with convoy from *Gibraltar*;" and, because there were no restraining words, it was held that the convoy must be for the whole voyage. Suppose there had been a voyage for two or three years—as to *China*, &c.—it cannot be thought that the under-writers would have been satisfied, if the property happened to be neutral at the commencement of the risk, and, without some large addition of premium, would have taken the chance of war during so long a voyage upon themselves. It is the understanding of all persons conversant with the subject, that, unless there be restraining words, the warranty extends to the whole duration of the voyage. The cases cited on the other side do not apply: They prove principles which the defendant has no occasion to dispute.

Lord MANSFIELD told *Smith* he had no occasion to reply.

Lord MANSFIELD,—Many points have been gone into on both sides, which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event. But the single question, here, is, what is the meaning of this policy. I had not a particle of doubt at the trial, and I know the jury had none; but Mr. Lee pressed for a case, and I granted one out of respect to him. What is the case? It is an insurance upon a ship, and her

(e) *H. 19 Geo. 3. supra*, p. 72.

1781.

EDEN
against
PARKISON.

[736]

her cargo, at and from *L'Orient* to *Rotterdam*. The insured warrant them neutral, and the defendant would have the court to add, by construction, "And so shall continue during the whole voyage." The contract is not so. The insured tell the state of the ship and goods *then*, and the insurers take upon themselves all *future* events, and risks, from men of war, enemies, detentions of princes, &c. The parties themselves could not have changed the nature of the property; but they did not mean to run the risk of war. If it made a difference what country the property belonged to, the under-writers should have enquired. The risk of future war is taken by the under-writers in every policy. By an implied warranty, every ship insured must be tight, staunch and strong; but it is sufficient if she is so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the under-writer will continue liable. The case of *Lilly v. Ewer* turns quite the other way. The decision there was, that the ship must sail with convoy according to the usage of the trade; *i. e.* convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is, that things stand so at the time; not that they shall continue.

WILLES and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—The case of *Lilly v. Ewer* is much against the defendant, for it was not contended, there, that the ship must *continue* with the convoy during the whole voyage.

The *Poslea* to be delivered to the plaintiffs [†158].

[†158] *Vide Salucci v. Johnson*, B. B. R. M. 30 Geo. 3. 3 Term Rep. 477. R. H. 25 Geo. 3. *Tyson v. Gurney*,

Tuesday,
26th June.

LOWE and Others against WALLER.

When upon a negotiation for a loan of money, the lender says he cannot advance cash, but will furnish goods, which the borrower takes and sells by the intervention of a

broker recommended by the lender, if the security given is made payable at a future day, for a sum exceeding the value of the goods and 5 per cent. interest, this is an usurious loan, and the security is void.—A bill of exchange given upon an usurious consideration is void, even in the hands of an indorsee for valuable consideration without notice of the usury.

[1] The action was directed by an order of the Court of Chancery, dated the 18th of December 1780.

the plaintiffs; but, they also insisted, that the bill was indorsed to them for a valuable consideration, and without notice of the supposed usury; and it was argued, that although it should appear that the original transaction was usurious, still the defendant was answerable to them.

Upon the evidence, the case was this:

Waller, a commissioner of the stamp duties, had employed one *Lemon*, a money-broker, to raise the sum of 200*l.* upon the bill in question. *Harris & Stratton*, hearing of this, sent their broker to *Lemon*, to enquire whether *Waller* wanted money, and he told the broker he believed he did, for, to his knowledge, he had a bill to pay in a few days. The broker said his principal would advance 100*l.* in money, and 100*l.* in goods, but that the goods should be choice sorts, and he should not lose by them; that he should have them at the warehouse price. *Lemon*, upon this, went and informed *Waller*, that *Harris & Stratton's* broker had been with him; and *Waller* asking him how they would deal, he told him what had passed, and that the broker had appointed him to go with *Waller*, to *Harris & Stratton's* warehouse, the next day. *Waller*, agreeably to appointment, went, along with *Lemon*, the next day, and found *Harris & Stratton* at their warehouse; who made an apology to *Waller* for not having any money at that time, but only goods; and desired the business might be let alone for a few days. *Lemon* called several times after this, to get a day fixed, and told them, as he had mentioned before to their broker, that *Waller* wanted money, in order to pay several demands. In the course of about three weeks, *Harris & Stratton* said to him, that, if *Waller* would come the next day, they would give him 50*l.* and he and *Waller* accordingly went the next day. When they came, one of the partners went out, and returned in a little time, saying he could not get any money, but, if *Waller* would take the whole in goods, he should have them directly. *Waller* agreed; and the goods, (hosiery ware,) were sorted out by one *Strutt*, a broker who was present, and delivered to *Waller*, and, at the same time, *Waller* delivered to *Harris & Stratton* the bill of exchange, and also an assignment of his salary, as a collateral security in case the bill should not be paid when it should become due. *Strutt* and *Lemon* carried the goods to the shop of *Elderton* an auctioneer, who was a stranger to *Waller*, and who was to sell them, or advance the value. He desired two hours to make his calculation, and, at the end of that time, *Lemon* and *Waller* came to him, and he offered 120*l.* for the goods, saying, it was the utmost they were worth. *Waller* took the 120*l.* it being agreed, that, if they should sell for more, the balance should be accounted for by *Elderton*, and, if for less, that *Waller* should be answerable to him for the difference.

1781.

LOWE
against
WALLER.

[737]

Vol. II.

X

Afterwards,

1781.

Lowe
against
Waller.

[738.]

Afterwards, *Elderton* delivered an account to *Waller* of the sale of goods at 117*l.* 2*s.* 2*d.* There was no evidence that the plaintiffs knew of the above transaction, or the circumstances under which the bill had been given.

The question whether the transaction was a loan of money for more than 5 *per cent.* under colour of a sale of goods, was left to the jury. If they should be of opinion, that it was, it was agreed that a case should be reserved on the other point, being a mere matter of law.

In summing up to the jury, Lord *Mansfield* told them, that the statute of usury (a) was made to protect men who act with their eyes open; to protect them against themselves. Upon this principle, it makes it penal for a man to take more than the fixed rate of interest, it being well known that a borrower in distress would agree to any terms. "No person shall take, directly or indirectly, for the loan of money, &c. above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time (b)." They were, therefore, to consider, whether the transaction between the defendant and *Harris & Stratton* was not, in truth, a loan of money; and the sale of goods a mere contrivance and evasion. The most usual form of usury was, his Lordship said, a pretended sale of goods. He then stated the material parts of the evidence, and made some strong observations to shew, that it was not the intention of the parties to buy and sell, but to borrow and lend, and that the contract was, in truth, for a loan of money, though under the mask of a treaty for the sale of goods.

The jury found the contract to be usurious, but if, in point of law, the plaintiffs should be entitled to recover, they assessed the damages at 222*l.* 10*s.* being the amount of the bill with the interest due upon it.

Upon this, a case was made for the opinion of the court, which,—after setting forth the bill of exchange, bearing date the 27th of *October* 1778, and payable in three months, with the indorsements, in blank, of *Lawton* and of *Harris & Stratton*,—stated; "That the bill was given by *Waller* the acceptor, to *Harris & Stratton*, upon an usurious contract, whereby more than legal interest was secured. That the plaintiffs took the bill from *Harris & Stratton* for a valuable consideration, and without notice of the usury."

In *Easter Term*, on *Thursday*, the 3d of *May*, *Dunning* obtained a rule to shew cause, why there should not be a new trial, upon the ground, that the original transaction was not a loan, but a sale of goods, and, therefore, though it might be fraudulent, it was not within the meaning of the statute of *Queen Anne*.

The

(a) 12 *Anne*, *B.* 2. c. 16.

(b) § 1.

The court expressed a wish, that *both* questions should come on at once; and, upon the first argument, the counsel for the defendant went into both; but, on the other side, they reserved * themselves on the *second* point, in order to argue it separately, in case the decision of the court should be against them on the *first*.

1781.

Lowe
against
Waller.

* [739]

On Friday, the 11th, and Monday, the 14th of May, the *Attorney General*, and *Davenport*, shewed cause against the new trial. They cited *Symonds v. Cockeril* (a), where a rent-charge of 20*l.* a year for eight years, and two years more, if *A.* and *B.* should live so long, was granted for 100*l.* and, upon replevin against the grantee, who had distrained for the rent-charge, the plaintiff pleaded in bar, that it was a corrupt agreement, and the court held, "That, if the original contract was for a rent-charge, *that* is not usury, but a good bargain and pennyworth, but, if the party had come to borrow the money, and then such a contract ensued by security, *that* is usury." They also cited the cases of *Massa v. Dauling* (a), and *Richards v. Brown* (c) [† 159]; which last case was much agitated and considered in this court, and finally decided in *Trinity Term*, 18 Geo. 3. [† 160] and in which, the real and original treaty being for a loan, although it was disguised under the appearance of selling an annuity, it was decided to be within the meaning of the statute.

Dunning, and *Morgan*, for the plaintiffs, contended, that the transaction was really a sale of goods; at an exorbitant and iniquitous price, to be sure; but, still, only a sale, the price to be paid at a future day, and for which future payment, the note and the assignment of the salary were given as securities. The first negotiation might be for a loan; but, in the course of the business, it came to be merely a bargain and sale; and as such, however fraudulent and culpable, it was not usury. *Morgan* observed, that, by the statute 37 Hen. 8. c. 9. (d), intituled, "A bill against usury," and revived by 13 El. c. 8. (e), it was made unlawful to sell merchandizes or wares, and re-purchase them again within three months, at a lower price. This was the only provision, in the acts on this

(a) *Noy*. 151.(b) *N. P. M.* 19 Geo. 2. 2 Str. 1243.(c) *Vide* an account of a subsequent part of that case, *E.* 19 Geo. 3. *supra*, p. 114.[† 159] Since reported, *Corwp.* 770.[† 160] The opinion of the court was delivered in *Easter Term*, 18 Geo. 3. in the absence of *Willes*, Justice, as

reported by Mr. *Cowper*, but, in *Trinity Term*, *Willes*, Justice, mentioned that he had read a written argument which Mr. *Hargrave* had sent him by the permission of the court, and that it had not altered his opinion, which was the same with that of the rest of the court.

(d) § 2.

(e) § 2.

1781.

LOWE
against
WALLER.

* [740]

this subject, relative to the sale of goods, and, therefore, it was to be inferred, that the legislature did not mean to extend the penalties against usury to * other cases of sales, however oppressive, or unfair. He cited *Murray v. Harding* (a); where the court of *Common Pleas* said, that no inequality of price, merely as such, will make a contract usurious (b); and *Floyer v. Edwards* (c), *Lord Chesterfield v. Jansen* (d), and *Lloyd, qui tam, &c. v. Williams* (e).

Lord MANSFIELD,—Before the statute of *Hen. 8. (f)*, all interest on money lent was prohibited by the canon law, as it is now in *Roman-catholic* countries. This gave rise to many shifts and devices to evade the law. One, which was then the most common, was provided against by that statute; but the prohibition being confined to that particular sort of transaction, usurers were, thereby, put upon other contrivances; and experience taught the legislature, in more modern statutes, not to particularize specific modes of usury, because that only led to evasion, but to enact, generally, that no shift should enable a man to take more than the legal interest upon a loan. Therefore, the only question, in all cases like the present, is, what is the real substance of the transaction, not, what is the colour and form. This is one of the strongest cases of the sort I ever knew litigated. It is impossible to wink so hard, as not to see, that there was no idea between the parties of any thing but a loan of money. His Lordship then recapitulated the striking parts of the evidence, and observed, that the whole complexion of the case shewed, that the only purpose of *Harris & Stratton* was, to contrive how to get more than legal interest. They first offered part in cash; then less, playing the defendant on, in order to increase his distress; and, at last, tempted him, by an offer to conclude the business immediately, if he would take the whole in goods; assigning to the last, as their reason for this, that they could not procure the money: They did not act as persons selling goods upon credit, to be paid for at a future day; but as lending on the security of the note and the assignment of the salary. The jury, therefore, had done perfectly right.

The rest of the court being clearly of the same opinion, the rule for a new trial was discharged.

The remaining question was argued, on the case reserved, in this present Term, on Tuesday, the 10th of June, by *Morgan* for the plaintiffs, and *Davenport* for the defendant.

(a) *C. B. H. 13 Geo. 3. Wils. 396.*(b) *Ibid. 395.*(c) *B. R. T. 14 Geo. 3.*(d) *Canc. H. 24 Geo. 2. 2 Vex. 125*1 *Wils. 286. 295.*(e) *C. B. M. 12 Geo. 3. 3 Wils.*250. 261. 2 *Blackst. 722. 792.*(f) 37 *H. 8. c. 9.*

In

In the case of *Bowyer v. Bampton*, reported by *Strange (a)*, it was determined, that, upon the construction of the statute of 9 *Ann. c. 14. § 1.* a promissory note, given for money knowingly lent to *game* with, is void in the hands of an indorsee for valuable consideration, and without notice; for the words of that statute being, "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, &c. where the whole, or any part, of the consideration shall be, &c. shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever," the court held, that it would be making the note of some use to the lender, if he could pay his own debts with it; and that the indorsee would not be without remedy, for he might sue the indorser, on his indorsement.

1781.

LOWE
against
WALLER.

This case having been much relied on by the counsel for the defendant, when they argued the present point, upon the motion for a new trial,—because, as they insisted, the words of 12 *Anne st. 2. c. 16.* though not exactly the same, are equally strong, with those just cited from the act against gaming, it was now contended, on the part of the plaintiffs; 1. That the two acts differed essentially as to the present question, and that, both before and since the statute of 12 *Anne*, usury was no bar against third persons not affected with notice; 2. That the case was contrary to other decisions, and not law. 1. *Notes* and *bills* are expressly mentioned in the act of 9 *Anne*, and are omitted in the other. Such a difference, in two statutes which passed so recently the one after the other, must have been intentional, and this being a question on a penal law, the court will construe it with the utmost strictness. It may, indeed, be said, that a bill comes under the word "*assurance*," used in 12 *Anne*; but it is fair to infer, that, as the word "*bill*" itself was, (and as it seems purposely,) omitted, the legislature could not mean to include *the thing* under a general term, and which, in common acceptation, is not extended to bills and notes; they being rather considered as *cash*, than as *assurances* for the payment of money. In all the prior acts against usury, from the reign of Queen Elizabeth—13 *Eliz. c. 8. § 3.* 21 *Jac. 1. c. 17. § 2.* and 12 *Car. 2. c. 13. § 2.*—as well as in 12 *Anne, st. 2. c. 16.* the words "*bonds, contracts, and assurances*," are used, and yet there is not a case in the books, from the 13th of Elizabeth, till this day, in which it has been determined, that the innocent holder of a bill of exchange shall be precluded, on account of usury in the original transaction, from recovering against the acceptor. Nay, it was expressly and solemnly decided, even in the case of a bond, (*viz.* in *Ellis*

[742]

(a) *B. R. T. 14 Geo. 2. Str. 1155.*

1781.

LOWE
against
WALLER.

Ellis v. Warnes (a), which was long after the statute of *Elizabeth*,) that,—“Where *W.* was indebted in 100*l.* to *A.* upon an usurious contract on a bond, and *A.* being indebted to *E.* transferred the debt to *E.*, and *W.* became bound for the same usurious debt to *E.* whose debt was just, and he ignorant of the usury,—the obligation made by *W.* to *E.* was not avoidable for the usurious contract made between *W.* and *A.*” Therefore, though bills should be considered as within the meaning of *assurances*, still the intention cannot have been to make them void in the hands of persons ignorant of the usury. Indeed it should seem, by the very words of all the acts, that the provision in question was only meant to be applied to securities where an usurious consideration appears on the face of the instrument: In all of them, the expression is, “whereupon, or whereby, there shall be reserved, or taken more than, &c.” 2. As to the authority of the case of *Bower v. Bampton*, it is directly contrary to the doctrine laid down by Lord Holt, in *Huffey v. Jacob* (b) [1], and which is stated by him as founded on previous determinations. “*A.* (says he) wins money of *B.* and, for a debt which *A.* owes *C.* he appoints *B.* to give *C.* a bond; ’tis good, because *C.* is an innocent person, and ’twill be the same thing if *A.* is bound with him;” or, as it is expressed in the report of the same case by COMYNS, “If a bill is given, for money won at play, to the winner, or order, and the winner indorses it to a stranger, for a just debt, and the person upon whom the bill was drawn accepts it in the hands of the stranger, the acceptor will be liable (c).” COMYNS, in his *Digest*, cites this case of *Huffey v. Jacob*, and adopts the position of Lord HOLT, as law (d). A contrary decision would be highly inconvenient to trade. Bills circulate like money, but if it become necessary for every man to enquire into the original consideration, before he can take one with safety, their currency will entirely cease.—Morgan also cited *Robinson v. Bland* (e), and *Rex v. Sewell* (f).

[743]

The arguments on the other side were; That the word “*assurances*” comprehends bills as much as any other sort of security; and to hold, that an innocent indorsee could make use of a bill given on an usurious contract, would be against the obvious meaning of the words “utterly void,”

(a) B. R. E. 1 Jac. 1. Moore 752. pl. 1035. Cro. Jac. 32. pl. 6. Yelv.

47.

(b) B. R. M. 8 Will. 3. 1 Salk. 344. Com. 4.

[1] That case arose upon the statute of 16 Car. 2. c. 7. § 3. the words of

which are nearly the same (as to this point) with those of 9 Ann. c. 14.

(c) Com. 6.

(d) 5 Com. Dig. 610.

(e) B. R. M. 1 Geo. 3. 2 Burr.

1077.

(f) N. Pr. M. 1 Ann. 7 Mod. 118.

in the statute of 12 *Anne*. Wherever the acts against gaming, and those against usury differ, it will be found that the provisions against usury are the strongest. Thus, though the statute of 9 *Anne* makes all securities given for money won at play, or lent to play with, void, it does not declare that the contract itself shall be void; and the prior act of 16 *Car.* 2. c. 7. which says, that contracts, and all securities for money lost [S] at play, shall be utterly void (c), does not extend to money lent to play with. Therefore, in the case of *Barjeu v. Walmfley* (d), it was held, that an action would lie on the contract for money knowingly lent to play with; and, in *Robinson v. Bland* (e), the same distinction was made. But, by 12 *Anne*, st. 2. c. 16. not only the security, or assurance, but the contract itself, is made void. This shews that the legislature was still more anxious to prevent usury than gaming. Now, as to gaming, the case of *Bowyer v. Bampton* is a direct and solemn authority. The decision was after two arguments; and LEE, Chief Justice, observed, that what Lord HOLT had said, in *Hussey v. Jacob*, was extra-judicial, and that he had seen a report, wherein notice was taken, that all the learned part of the bar wondered at it. Indeed, by the report of the case in *Carthew* (f), the court is only made to say, "that, if the bill had been negotiated and indorsed to any other person, for value received, then it might have been another consideration." It must be admitted, that the bill, in the present case, was void at first. Now, how can a thing void in its origin, be rendered valid by any thing done to it afterwards? If it were to be held, that it should appear on the face of the instrument, that more than 5 per cent. is to be paid, the statute would become almost a dead letter; for what usurer is so unskilful in his trade, as to suffer the usury to appear on the face of the security? And how easy will it be for the lender to pay away bills on which he himself could not recover, either *bonâ fide*, to persons to whom he is indebted, or colourably, to some secret partner in the business, but whose knowledge of the usury cannot be traced? It is said, it will be dangerous to trade, if third persons cannot recover. But this supposes that usurious contracts are very universal; and, if they are, it is highly proper they should receive a check of this sort. Besides, what greater risk will there be than is run every day, when notes or bills are taken from women who may be under coverture, or from young persons who

1781.

LOWE
against
WALLER.

[744]

[S] To the amount of more than 100l. at any one time or meeting. (c) B. R. M. 1 Geo. 3. 2 Burr. 1077. Law of N. Pr. 274. Ed. of 1775.

(c) § 3.

(d) B. R. H. 19 Geo. 2. 2 Str. 1249.

(f) Carth. 356.

1781.

LOWE
against
WALLER.

may be minors, unknown to the persons taking such notes or bills? If *Harris & Stratton* are solvent, the plaintiffs will not suffer; and it is the business of indorsees to satisfy themselves with respect to the solvency of the indorser. In the case of *Ellis v. Warnes*, there was an immediate security given to the third person; and so indeed it is supposed to be, in the case put by Lord HOLT, in *Hussey v. Jacob*, as reported by *Salkeld* (a).

The court took till this day to consider; and now Lord MANSFIELD delivered their opinion to the following effect.

Lord MANSFIELD,—We have considered this case very attentively, and, I own, with a great leaning and wish on my part, that the law should turn out to be in favour of the plaintiffs. But the words of the act are too strong. Besides, we cannot get over the case on the statute against gaming, which stands on the same ground. This is one of those instances in which private must give way to public convenience. It is less mischievous that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover upon the bill.

The *Posse* to be delivered to the defendant [†161].

(a) *Salk.* 344.

B. R. T. 14 Geo. 3. Cowp. 110.

[†161] *Vide Floyer v. Edwards*,

[745]

Thursday,
28th June.

TAYLOR against WHITEHEAD.

A motion may be made in arrest of judgment after a rule for a new trial has been discharged, and at any time before judgment is entered up. —It is not a good justification in trespass that the defendant has a right of way over part of the plaintiff's land, and that he had gone upon the

TRESPASS for breaking and entering the close of the plaintiff, at the parish of Otley, in *Yorkshire*. The defendant pleaded: 1. The general issue: 2. A right of way, by prescription, through a lane of the plaintiff's contiguous to the *locus in quo*, to Otley bridge on the river *Wharfe*; that the tenants and occupiers of the *locus in quo* were, from time whereof, &c. by reason of their tenure, bound to repair the lane, and the banks thereof next to the river; that, at the several times when, &c. the lane was out of repair and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life, and goods; and that he necessarily went into, through, and over, the *locus in quo*, as near to his said way as he possibly could, as it was lawful for him to do for the cause aforesaid: 3. That the *locus*, &c. lay contiguous to a lane of the plaintiff's, and adjoining land, because the way was impassable from being overflowed by a river.

and that the said lane was adjoining to the river *Wharfe*; that the defendant had a right of way, by prescription, through and over the lane; and, that, because the lane and way were *overflowed with water from the said river* so much that the defendant *could not* at the several times, *&c. pass or repass*, he did *necessarily* go out of the said way, as near to the said way as he possibly could, into, through, and over, *&c.*

The plaintiff having *traversed* the prescription to repair laid in the first special plea, and the right of way laid in the last, the cause came on to be tried, before Lord LOUGHBOROUGH, at the summer assizes for *Yorkshire*, 1780; and the jury found for the plaintiff, on the general issue and the first special plea, and for the defendant on the last.

In *Michaelmas Term* (a), a rule was obtained, to shew cause, why there should not be a new trial on the issue found for the defendant, as having been found against evidence, which rule was, upon argument, discharged (b).

Afterwards, *Fearnly* obtained a rule to shew cause, why the plaintiff should not be at liberty to enter up judgment on that issue, as well as the others, notwithstanding the finding of the jury, on the ground, that, in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

On *Saturday* the 3d of *February*, cause was to have been shewn against this rule, and *Lee* objected, that it had been applied for too late, for that it was in the nature of a motion in arrest of judgment; and, he said, he had always understood the practice to be, that such a motion could not be made after a new trial had been moved for, unless the court, upon granting the rule for a new trial, should have given leave, if that should be discharged, to follow it by a motion in arrest of judgment. It seemed, he said, very unreasonable, that a party should be permitted to avail himself, in so late a stage of the cause, of an objection that might have been taken in the first instance, by a demurrer to the plea, by which mode of proceeding, if the objection was founded in law, all the expence and vexation of the trial, and the motion to set aside the verdict, would have been avoided. In answer to this, it was observed, by *Dunning*, that it would be extremely absurd if an objection should be stated to the court, and they should be convinced that the party had not, by law, a right to judgment in his favour, that they should yet be necessitated, by any rule of practice, to pronounce an erroneous

1781.

TAYLOR
against
WHITE-
HEAD.

[746]

(a) *Thursday*, 9th Nov. 1780.(b) *Friday*, 24th Nov. 1780.

1781.

TAYLOR
against
WHITE-
HEAD.

erroneous judgment in his favour, and so force the other party to bring a writ of error.

After some consideration, and conference with the Master, the court declared their opinion, that a motion in arrest of judgment may be made at any time before judgment is entered up, and that the present motion, being of the same nature, was not too late.

It now appeared, that the officer, by mistake, had entered a verdict for the defendant on all the issues; upon which it became necessary for the plaintiff's counsel to move for a rule to shew cause, why the *Postea* should not be amended, from the Judge's notes, agreeably to the finding of the jury, and that the rule then before the court should, in the mean time, be enlarged.

The *Postea* was afterwards amended, and, this day, the question on the validity of the last plea was argued.

[747]

Lee, Davenport, and Wood, for the defendant.—They argued as follows.—It is clear law, established by a number of cases, particularly that of *Abfor v. French*, in *Show-er* (a), and *Henn's Case* (b), that, where a common highway is out of repair, by the overflowing of a river, or any other cause, passengers have a right to go upon the adjacent ground. So, if the water impairs the banks of a navigable river, which indeed is considered as a highway, it is justifiable to go upon the nearest part of the field next adjoining (c). No cases are to be found upon the question as to private ways; but there are determinations the principle of which is, that, where it becomes impossible for a person to exercise his right without a trespass on the soil of another, the law will excuse the trespass. Thus, in *Dike & Dunstan's Case* (d), it is stated [1], from the Year-book of 6 *Edw. 4.* "That, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, then he may well justify the felling it upon the other's land, because, otherwise, he could not lop it at all." So, in the case of *Miller v. Fandrye*, reported in *Popham* (e), "A man may justify chasing sheep with a dog upon another man's ground, if he cannot otherwise drive them off his own." And, in that case, there is one cited from 22 *Edw. 4. 8.* where it was held, "That, for necessity, a man who plows may turn his plow on the land of another;"—(BULLER, *Justice*, "There a custom was laid.")—And another from 8 *Edw. 4.* where it was laid down, "That, if a tree grow in a hedge,

(a) *B. R. M.* 30 *Car. 2.* 2 *Show.* 28. *Lev.* 234.

(b) 8 *Car. 1.* Sir *W. Jones*, 296.

(c) *Young v. —*, *N. Pr.* before Lord *Holt*, 1 *Ld. Raym.* 725.

(d) *B. R. M.* 28 & 29 *El. C.*

4. 52.

[1] By counsel.

(e) *B. R. E.* 2 *Car. 1.* *Poph.* 161. —But that part of the Reports is not by *Popham*.

hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it." These are all trespasses occasioned, as in the present case, by the unavoidable interruption of the exercise of private rights in the regular way. It is of no consequence, upon this issue, who is bound to repair the road, because the justification is not, that the road was out of repair and ought to be repaired by the plaintiff, but that, by the overflowing of the river, it was *impossible* for the defendant to pass along the way, and, therefore, he *necessarily* went out of it. If the question who ought to repair is said to be the material part of the case, and that the issue tried on the second special plea was immaterial, the motion ought to have been for a repleader; but, as the plaintiff took the issue, the court will not grant a repleader on his application (*f*). Supposing it not to be true in all cases, that a person having a private way over the land of another, may, when the way is impassable, justify going on the adjoining ground; yet, surely, he may, where the land over which the way is, and the adjoining land, both belong to the same person. He, or those under whom he claims, having granted a right of way over his estate, if the usual track becomes impassable, the right continues, and must be exercised on the neighbouring ground belonging to the grantor.

Lord MANSFIELD mentioned, that BLACKSTONE, in his Commentaries, expresses an opinion, that the law of England corresponds with the *Roman* law, on this point, extending the right of going on the adjoining ground, when a road is out of repair, to private as well as public ways (*a*), and that COMYNS, in his *Digest*, seems to have entertained the same opinion (*b*).

Walker, Serjeant, for the plaintiff, insisted, that, by the common law, the grantee of a private way is bound to repair, unless there is an express stipulation for the grantor to do it. This principle, he said, was clearly deducible from the ultimate determination in the case of *Pomfrett v. Ricroft* (*c*), where one having granted the use of a pump, for a term, to another, and the pump having fallen into disrepair, the grantee brought his action against the grantor, and, upon demurrer, the court of *King's Bench*, (three Judges against TWISDEN,) that it well lay, for that the grantor was bound to repair; but, upon a writ of error to the *Exchequer Chamber*, their decision was unanimously reversed. Now, on this record, he said, it was expressly found, on the first special plea, that the plaintiff was not bound to repair, and, by the second, no custom or duty for him to repair was alleged. The defendant,

1781.

TAYLOR
against
WHITE-
HEAD.

[748]

(*f*) *Supra*, p. 396.(*a*) 3 *Bl. Comm.* p. 36.(*b*) *Com. Dig.* Tit. *Cl. min.* D. 6.(*c*) *B. R. M.* 21 *Car.* 2. 1 *Saznd.* 321.

1781.

TAYLOR
against
WHITE-
HEAD.

defendant, therefore, must be considered as bound to repair in this case; and, if the road had become impassable by his neglecting to guard against the overflowing of the river by keeping up the banks, it was his own fault, and he could not, on that account, be entitled to trespass on the neighbouring ground.

The court stopped *Fearnly*, who was to have argued on the same side.

LORD MANSFIELD,—The question is upon the grant of this way. Now it is not laid to be a grant of a way generally, over the land; but of a precise specific way. The grantor says, You may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my brother *Walker*, that, by common law, he who has the use of a thing ought to repair it. The grantor may bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for aught that appears, that may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line.

WILLES, and ASHHURST, *Justices*, of the same opinion.

BULLER, *Justice*,—If this had been a way of necessity, the question would have required consideration, but it is not so pleaded. It does not appear that the defendant had no other road. There can be no ground for a reprieve, for the plea is substantially bad; there is no fact alleged in it which it could serve any purpose to deny, and go to issue upon.

The rule made absolute.

ZINK against LANGTON.

Thursday,
28th June.

A *certiorari* cannot be sued out as of course, and without laying a special ground before the court, to remove proceedings from the courts of the counties palatine.

IN last *Easter Term*, on *Wednesday*, the 2d of May, *S. Heywood* obtained a rule to shew cause, why an attachment should not issue against the Prothonotary of the court of *Common Pleas* for the county palatine of *Lancaster*, for not obeying a writ of *certiorari*, which had been directed to him, to remove the proceedings in this cause from that court into this [1].

The *Attorney General*, afterwards, in the same term, obtained a rule to shew cause, why a *superfedeas* to the writ of *certiorari* should not issue.

[1] The writ of *certiorari* out of this court was directed to the Chancellor of the county palatine, and commanded him, that, "by our writ, under the seal of our said county palatine," he should command the Prothonotary to

Each

certify

Both these rules were enlarged till the present term, and, this day, they were spoken to, by the *Attorney General*, and *Wilson*, in * support of the rule for a *superfedeas*, and by *Dunning*, on the other side.

The circumstances of the case were these: Before the writ was to plead in the action below, was expired, the writ from this court, together with another from the Chancellor of the county, consequent upon it, (as mentioned in note [1],) were delivered to the deputy Prothonotary. He had never before known an instance of such a proceeding, he deferred returning the writ, and, at the next assizes, *WILLES*, *Juslice*, granted a rule to shew cause, why the plaintiff should not sign interlocutory judgment, notwithstanding the *certiorari*; and, upon shewing cause, and hearing the question, whether the *certiorari* would lie, he permitted the plaintiff to sign interlocutory judgment, but, on condition, that he should not take out execution till there should be an opportunity of moving this court. A writ of enquiry was afterwards executed, and damages given, to the amount of 672*l.* 4*s.* 6*d.* but the judgment was not signed. The *affidavits* on which the rule for the attachment was moved for, did not state any particular cause, and it came out, when the case was argued, that the attorneys on both sides had agreed, that the motion below should be made for signing interlocutory judgment.

It was contended, by the *Attorney General*, and *Wilson*, that, as there was no instance of a *certiorari* to a county palatine to remove a record before judgment, it must be presumed, that the court has no right to issue such a writ; at least, the novelty of the attempt showed there was no necessity for exercising the right, if it really existed. It would be highly inconvenient, particularly in the county palatine of *Durham*, because, there, the pleadings begin, and the cause comes to trial, at the very same assizes; and, if a *certiorari* could be brought, defendants would in general come provided with one instead of a plea; and, the practice can be supported in the case of the county palatine of *Lancaster*, it must be equally valid in that of *Durham*. But, at all events, they said, the court must have a discretion, and it was sufficient reason to supersede the *certiorari* in this case, that it had been sued out as of course,

1781.

ZINK
against
LANGTON.

* [750]

certify the said complaint to him, "that you may certify the same to us at *Westminster*, &c." In obedience to which, a writ was made out, directed to the Prothonotary, in the nature of a *mandate*, (but called a *mandate* in the language of that court,) under the seal of the county palatine, but in the

King's name, commanding him to certify the complaint, &c. "to us, so that the same may appear to us at *Westminster*, &c." Neither of the writs assigned any particular ground, but only said, "we being willing," for certain reasons, to be certified on a certain complaint, &c.

1781.

ZINK
against

LANGTON.

[751]

course, without any special cause, and obviously only for the purpose of delay; and the court would not grant an attachment for not obeying a writ which never ought to have issued.

On the other side, *Dunning* stated, that there were instances of writs of this sort having issued, and, particularly, one about seven years ago, which could be produced, where there had been a return, but the cause was afterwards made up. The question, on the rule for an attachment, was not, he said, whether the writ had issued properly or not. A *certiorari* had, in fact, been directed to the Chancellor of the county palatine, who had not taken upon him to question the propriety of it, but had thereupon issued his mandate to the Prothonotary. The Prothonotary ought to have obeyed it, without examining whether the defendant was right or wrong in suing it out; and then, when returned, the plaintiff might have moved to quash it, if he had been so advised. The defendant had not stated the reasons for suing it out, in the *affidavits* he had filed, because they were not at all relevant to his motion. As to the agreement between the attorneys, that did not purge the contempt of the officer, which had been incurred before the assizes began.

Lord MANSFIELD,—The only consequence of the writ would have been, that the cause would have gone back to be tried, six months afterwards, by a jury of the same county, and probably before the same Judge; for records in this court, in causes from the county palatine, are sent to be tried there. There is no doubt but this court may, under particular circumstances, as in a case which calls strongly for a trial at bar, grant a *certiorari* to remove proceedings from a county palatine [2]. But such a writ cannot be sued out, without laying a ground

[2] In *Easter Term*, 22 Geo. 3. on *Wednesday*, the 1st of *May*, in a case of *Williams v. Thomas & another*, a rule was obtained to shew cause, why a writ of *certiorari*, which had been sued out by the defendant as of course, and without any application to the court, to remove the proceedings in an action depending in the court of Great Sessions for the county of *Pembroke*, should not be superseded. On *Monday*, *May* 13, the last day of term, cause was shewn, and an *affidavit* of the defendant produced, by which he swore that from the influence of the plaintiff in the county of *Pembroke*, and his being himself an entire stranger there, he

believed he could not have a fair trial. It was said on this occasion, that there were many instances of *certiorari* to counties palatine, and to the court of *Ely*, and several, to remove indictments from the courts of Great Sessions in *Wales*. In general, indeed, those were brought by the prosecutor, for which there is a sort of reason, viz. that it being the suit of the King, he may try it where he pleases. But there is one at the suit of a defendant, in the case of *Rex v. James*, T. 10 W. 3. 12 M. 197.—*Wallace*, and *Douglas*, for the plaintiff.—*Bower*, for the defendant.—Lord MANSFIELD said, that the writ was not of course, and as it had been sued

for it, and, as the writ was sued out, in this case without laying any ground, it issued improvidently, and must be superfed; and, as to the * officer, he is cleared from any contempt in not obeying it, by the agreement between the attorneys.

1781.

ZINK
against
LANGTON.

The rule for an attachment discharged, and the other* [752] made absolute [3] [† 162].

sued out in this case, without laying any ground before the court, it must be superfed. In all cases where a defendant applies for a *certiorari*, he must lay some ground for it, before the court, supported by affidavit. *R. v. Eaton*, *M.* 28 *Geo.* 3. 2 *Term Rep.* 89.

[3] Final judgment was afterwards signed, and the defendant brought a writ of error in this court, upon which the judgment below being affirmed, a rule was obtained to shew cause, why the Master should not compute interest on the sum given by the jury on the writ of inquiry, from the day of signing final judgment below, down to the time of the taxation of costs, and why the same should not be added to the costs taxed for the plaintiff. In *Easter Term*, 22 *Geo.* 3. on the last day of that term, *S. Heywood* argued against the rule, and *Wilson* in support of it.

By 3 *Hen.* 7. c. 10.—reciting that writs of error were often brought for delay,—it is enacted, “That when judgment shall be affirmed, or the writ discontinued, or the party nonsuited, on a writ of error brought by a defendant or tenant, the person against whom it is sued out, shall recover his costs and damage, for his delay and wrongful vexation in the same, by discretion of the Justice (a) afore whom the said writ of error is sued.” 19 *Hen.* 7. c. 20. recites this act, and that it had not been put in force, and enacts that it shall be thenceforth duly put in execution. *Heywood* contended, that interest could not be allowed under this statute, because, at the time when it passed, and until the following reign, all interest was against law (b), and, therefore, though the word “damage” was used in the statute, it must be considered as

only tautology, and synonymous to “*c. sts.*” He cited *Penruddock v. Errington*, *B. R. M.* 39 & 40 *El. Cro. El.* 587. *Coan v. Bowles*, *B. R. M.* 2 *W. & M.* 1 *Salk.* 205. and *Bowton v. Nicholls*, *B. R. H.* 10 *Car.* 1. *Cro. Car.* 401. as authorities to shew that the statute of *Hen.* 7. is to be construed strictly. But he chiefly relied on the case of *Holroy v. Ebixson*, *B. R. H.* 1 *Geo.* 1. 10 *Mod.* 274. as directly in point.—That was an action in *C. B.* on several promises; judgment by default; writ of enquiry; and final judgment; and that judgment affirmed, upon error brought in *B. R.* Upon this affirmance, the court was moved, on 3 *Hen.* 7. c. 10. that the defendant in error should, besides his costs, have interest allowed him for the sum adjudged due to him, pending the time of the writ of error, from the judgment. The question was fully argued and, against the application, the practice of the court of *Exchequer Chamber*, which was admitted to be not to allow interest, was relied on, and it was insisted, that costs and damages are often, in law, synonymous expressions, and ought to be so understood in construing the statute of *Hen.* 7. On the other side, it was said, that the court of *Exchequer Chamber*, not having been erected at the time of the statute, was not within the operation of it, and that though the word “*damna*” does sometimes signify costs, yet it never does when joined with “*custagia*,” and that costs and damages are distinguished in every *Possea*. The court took time to consider, and then delivered their unanimous opinion; “That the defendant, upon a writ of error brought into *B. R.* should not have interest allowed him by way of damages

(a) *Supra*, 561. Note (5) (b) *Supra*, *Low v. Waller*, p. 740.

1781.

ZINK
against
LANGTON.

"damages for the sum
"adjudged due to him
"from the time of the
"first judgment, pend-
"ing the writ of er-
"ror, for, at the time
"of making the statute
"of 3 Hen. 7. c. 10. all interest was
"reputed unlawful; and, therefore,
"that statute could not give it. In
"fact, when interest run highest, as
"at 10 per cent. it had not been al-
"lowed. In the *Exchequer Chamber*
"it had not been allowed, and uni-
"formity of practice was to be wished
"and endeavoured."—*Heywood* then
observed, that it was clear, from 2 And.
123. as well as from the judgment of
the court in the last-mentioned case,
that the statute of Hen. 7. extends to
the court of *Exchequer Chamber*, and
that the practice of that court never to
allow interest was not only admitted
by the parties, and recog-
[753] nized by the court, in that
case, but also stated by Lord
Mansfield, in the case of *Bodily v. Bel-
lamy*, B. R. M. 1 Geo. 3. 2 Burr. 1094.
1 Blackst. 267. He acknowledged,
that, in one sort of action, viz. *quare
impedit*, this court had allowed inter-
est, as in the case of the *Bishop of
London v. the Mercer's Company*, B. R. H.
5 Geo. 2. 2 Str. 925; an anonymous
case, M. 4 Car. 1. in Cro. Car. 173.
and the case of *The Earl of Pembroke
v. Byssick*, M. 5. Car. 1. Cro. Car. 173.
but, in that action, he said, the inter-
est was allowed as a compensation
to the party for being kept out of a
living, from which, at the time of
Hen. 7. a legal annual profit would have
been derived; whereas, at that time,
no legal annual profit could have been
derived from a sum of money; and,
therefore, to prevent a party from
making interest, by keeping him out
of it, after judgment, by a writ of

error, was no legal damage.—*Wilkin*,
on the other side, said, that the only
reason he could see for the re-enact-
ment of 3 Hen. 7. c. 10. by 19 Hen. 7.
c. 20. was, that the Judges had scrupled
enforcing the former statute, on
account of the ideas entertained, in
those days, about the illegality and sin
of taking interest. But though it
might be unlawful to take interest in
the reign of Hen. 7. and, therefore, it
might not, then, be any damage in
the eye of the law to be prevented from
making interest of a sum of money,
yet, as soon as the legislature permit-
ted interest to be taken, the loss of the
opportunity of making interest be-
came a legal damage, to which the
act of Hen. 7. would apply. He ad-
mitted, that interest was not to be al-
lowed as of course upon the affirm-
ance of a judgment by a court of er-
ror, but required an application to the
court. This had been stated by Lord
Mansfield, in the case of *Bodily v. Bel-
lamy*, and was all that there was in that
case applicable to the present—Lord
Mansfield mentioned, that what he had
delivered on that occasion, was the
result of a strict enquiry into the prac-
tice of all the courts. He said, the pre-
sent question was a matter of some
consequence, and, therefore, the court
would think of it till the next term.
In T. 22 Geo. 3. (*Friday*, the 7th of
June.) his Lordship delivered the opi-
nion of the court, that "damage" in
the statute of Hen. 7. must mean some-
thing different from *costs*, as both words
are used: that the question was, what
was to be the rule for assessing the da-
mage; and that, in this case, the in-
terest ought to be the measure of the
damage, the action being for a debt (*a*);
but that, in a case of another sort, the
rule might be different.—The rule
was therefore made absolute.

[†162] Vide 2 Bulstr. 158.

(a) The action was *indebitatus as-
sumpsit*. If by the course of the
court of error, interest is not computed
in the allowance of costs, on the affirm-
ance of the judgment, the jury may

give interest by way of damages, from
the time of signing the original judg-
ment. *Entwistle v. Shepherd*, B. R. M.
28 Geo. 3. 2 Term Rep. 78. But, in
debt on a recognizance against bail in
error

error in the *Exchequer Chamber*, the bail are not liable to pay interest between the time of the original judgment and the affirming the words of the recognizance in *that* court of error, being to pay the sum, &c. and such further costs, &c. In *B. R.* the bail

in error undertake to pay the sum, &c. "as also all such costs and damages, &c." *Frith v. Leroux, B. R. M. 28 Geo. 3. 2 Term Rep. 57. 59. & note (a).*

1781.

ZINCK
against
LANGTON.

GOODTITLE, Lessee of WINCKLES, *against*
BILLINGTON and Another,

Friday,
29th June,

THIS was an ejectment, tried before Lord LOUGHBO-ROUGH, at the last *Lent* Assizes for the county of *Buckingham*. A verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved, which stated, (as far as is material,) as follows:

Bernard Chevall, in 1774, made his will, in which, *inter alia*, there was this devise:—"Next, I give and devise unto my said loving wife, *Elizabeth Chevall*, and unto my daughter *Anne Chevall*, all that my messuage, tenement, or farm, (&c. viz. the premises in question,) to hold the said messuage, tenement, * or farm, &c. unto my said wife *Elizabeth Chevall*, and unto my daughter *Anne Chevall*, for and during the term of their natural lives, and the life of the longer liver of them, in equal portions, share and share alike. But, in case my said daughter *Anne Chevall* should happen to marry and have issue of her body lawfully begotten, then, and in that case, after the decease of my said wife, I give and devise all and singular the said messuage, tenement, or farm, &c. unto my said daughter *Anne Chevall*, and to her heirs and assigns for ever. But, if my said daughter should happen to die single and unmarried and without issue of her body lawfully begotten, then, and in that case, I give and devise all and singular the aforesaid premises last above-mentioned, unto my said wife *Elizabeth Chevall*, and to her heirs and assigns for ever."—The testator died on the 24th of December 1774, leaving *Elizabeth Chevall* his widow, and his daughter *Anne Chevall*, who was by another wife, his heir at law. *Elizabeth Chevall* died on the 30th of June 1775. After her death, *Anne Chevall* suffered a recovery of the premises in question, and devised them to the defendants. She afterwards died unmarried. The lessor of the plaintiff was the brother and heir at law of *Elizabeth Chevall*.

The question was, Whether the limitation over to *Elizabeth Chevall* and her heirs, was barred by the recovery suffered by *Anne Chevall*?

Graham, for the plaintiff, contended, that it was not; for that it was either an *executory devise*, and not too remote

By a devise, to A. & B. for their lives and the life of the survivor, but, in case B. should marry and have issue, then, after the death of A., to B. and her heirs, but, if B. should die single and without issue, then to A. and her heirs,—A. and B. take a joint estate for life, with contingent remainders in fee simple, to each in the alternative.

* [754]

1781.
GOODTITLE
against
BILLING-
TON.

[755]

mote in its creation, or a *vested remainder*, after estates for life to Elizabeth and Anne Chevall and the survivor, and a contingent estate-tail to Anne Chevall. 1. On the first point, and which was founded on the supposition that the limitation to the daughter, in case she should marry and have issue, was in fee-simple, he admitted, that it would be necessary for him to distinguish this case from that of *Luddington v. Kime* (a), and other subsequent cases of the same sort. In all those cases, he said, the limitation over was such, that, though the contingency on which it was limited should happen before the end of the original specified duration of the particular estate, yet it must await the natural expiration thereof, before it could vest in possession. Thus, in *Luddington v. Kime*, though the tenant for life might have issue male in his life-time, which was the contingency on which the remainder to such issue male was limited, yet the estate to such issue male was not to take effect in possession, till after the regular expiration of the particular estate by the death of the tenant for life. This is essential to the idea of a remainder, according to the definition in *Coke Littleton*, viz. that it is "a remnant of an estate, in lands or tenements, *expectant* upon a particular estate, created together with the same at one time (b)." So, in *Chudleigh's Case* (c), it is said,—"The rule of law is, that he in remainder must take the land *when the particular estate determines*, or else the remainder shall be void (d)."—In *Cholmley's Case* (e)—"A remainder ought to take effect in possession when the particular estate ends (f)."—And, in *Boraston's Case* (g), almost in the same words,—"The remainder ought to commence in possession, when the particular estate ends (h)."—In like manner, the definition of a remainder in *Noy's Maxims* is, "That it is the residue of an estate, at the same time appointed over, and *must be grounded* on some particular estate given before, granted for years or life, and so forth; and ought to begin in possession, when the particular estate endeth (i)." The same principle is laid down repeatedly in the case of *Colthirst v. Bejushin*, in *Plowden* (k) [1]. But, here, the limitation

(a) C. B. E. 9 W. 3. 1 Ld. Raym. 203, 1 Salk. 224. 3 Lev. 431. and stated *supra*, 265.

(b) Co. Litt. 143. a.

(c) B. R. H. 31 El. 1 Co. 120. a.

(d) *Ibid.* 135. a.

(e) Scacc. E. 39 El. 2 Co. 30. a.

(f) *Ibid.* 51. a.

(g) B. R. H. 29 El. 3 Co. 19. a.

(h) *Ibid.* 21. a.

(i) *Noy's Maxims*, 31.

(k) C. B. E. 4 Edw. 6. *Plowd.* 21.

24. 32.

[1] All the definitions herecited, and relied on, point only at this essential quality of a remainder, that it must be so limited as that it may, by possibility, be capable of vesting in possession, at the latest, on the regular and natural determination of the particular estate; or, as it is expressed, though rather obscurely, in *Plowden* (25), "that the particular estate continues *when*,"

(which word there means *until*) "the

"remainder

limitation to the daughter *Anne Chevall*, in case she should marry and have issue of her body, was not to wait till the natural expiration of the first estate for life to her, but was to take effect in her life-time, as soon as the contingency on which it was limited should happen. It is, therefore, not a remainder, but a conditional limitation. As soon as she had

1781.

GOODTITLE
against
BILLING-
TON.

"remainder vests." It does not cease to be a remainder, because it may vest in possession on an event which, from the terms, or from the legal nature, of the original limitation, shall defeat the particular estate before its natural or regular expiration. Every remainder limited after an estate for life may vest in possession before the death of the tenant for life, (which is the term of the natural expiration of the particular estate,) namely, in consequence of any forfeiture which he may commit. Some have been inclined to consider conditional limitations after particular estates, (as, for instance, after an estate for life,) but limited to vest in possession on a contingency which may happen before the death of the tenant for life, as not being remainders (1). Thus, if an estate is given to *A.* for life, provided that, when *C.* returns from *Rome*, it shall, from thenceforth, be to the use of *B.* in fee, it is said this limitation over is not confined to the remnant expectant on the particular estate before given to *A.*, but may interfere with, and in part defeat and supersede, that first estate, instead of awaiting its regular determination; and, therefore, it does not answer the definition of a remainder in *Co. Littl.* 143. a. (cited *supra*, p. 755). But this seems too great a refinement. Every estate for life may, by the act of the tenant for life, be defeated, and abridged, before its regular expiration, and, thereby, let in the remainder over in the manner above-stated, and the only difference between such limitations and the others, is, that, in the others, the estate for life is not abridged by the act of the tenant for life, but by some extrinsic event which happens also to be the

contingency on which the limitation over depends. But no decided cases that I am aware of, have ever considered limitations of this last sort as not being remainders. They have all the legal incidents and attributes of remainders. They may be barred in the same manner, (*Page v. Hayward*, 2 *Salk* 570.) and are limited to vest in possession, at the latest, on the regular determination of the preceding estate; for, in the case put, if *C.* should not return from *Rome* till after the death of *A.* I conceive the estate to *B.* could not take effect. This, I think, is to be collected from the determination in this very case of *Goodtitle v. Billington*; for it seems that it would have made no difference, with regard to the contingent limitation over to the daughter in the event of her marrying and having issue, although the joint estate with the widow, and the survivorship, had been given, not to the daughter, but to a stranger. Indeed, what difference, more than what is merely verbal, can there be shewn to be between an estate to *A.* till *C.* returns from *Rome*, and then to remain over to *B.* and an estate to *A.* provided that when *C.* returns from *Rome*, it shall, thenceforth, be to *B.* Under both forms of expression, *A.* takes an estate for life defeasible on the very same event, and *B.* a contingent interest depending on the very same event. The expressions "till," "&c." and "then, &c." in the first case seem to me to be exactly convertible with "provided that when, &c." "It shall then, &c." in the other. Now the first is given as an example of a species of contingent remainders, in the very work where the supposed distinction is stated (d). As to the first limitation,

(1) *Fearne*, 3d Edit. p. 9, 10.(d) *Fearne*, p. 4, 10.

1781.

GOOD TITLE
AGAINST
BILLYNG-
TON.

[757]

had married, and had issue, the estate, to her and her heirs, would have taken effect, and would have enlarged her interest, and merged her estate for life. This limitation to the daughter is, therefore, within the principle of the decision in *Pells v. Brown* (a). There, an estate was given in fee, defeasible on the event of the devisee dying without issue living the devisee over. Here, a life estate is given, enlargeable on the event of the daughter's marrying and having issue. In *Pells v. Brown*, the limitation was held to be, not a remainder, but a conditional limitation, and good by way of executory devise. Here, in like manner, the second limitation to the daughter is not to be considered as a remainder; and, if it is not, the subsequent limitation must be an executory devise. As an executory devise, it is not too remote, for it is limited to vest, if at all, on the death of the daughter. 2. But, if the second limitation to the daughter should be thought to be a remainder, then it may be necessary to consider, whether the testator meant to give her any thing more than an estate-tail by that limitation, and, though the words are, "Unto my said daughter" and "to her heirs and assigns for ever," yet subsequent words may restrain the estate to a fee-tail, as in the case of *Doe v. Reason* (b). Here, there are subsequent words which seem to indicate an intention only to give the daughter an estate-tail; and, if that construction should prevail, the first limitation over to the wife was a vested remainder, and, of course, not barred by the recovery; for it is only contingent on the supposition of the preceding contingent limitation being in fee; it being a rule, that all estates limited after a contingent fee, must be contingent, on account of the established maxim, that a fee cannot be mounted on a fee.

During *Graham's* argument, *BULLER, Justice*, observed, that, if *Anne Chevall* had married and had issue, her life estate would not have merged, as contended by *Graham*, because it was not limited to take effect till the death of the wife.

tation, in either case, being to *A. indefinitely*, or to *A. for life*, that can make no difference, because a limitation to *A. indefinitely* carries a life interest, as effectually as if the words "for life" were added. The law supplies them (c). In short, the expression and idea of a conditional limitation was originally adopted to evade the necessity of the entry of the heir, in order to take advantage of the defeasance of a prior estate, and all condi-

tional limitations in wills seem reducible, either to the head of executory devises, of which sort was that in *Pells v. Brown*, or of contingent remainders, to which the second limitations to the daughter in this case of *Goodtitle v. Billyngton* seems to belong.

(a) *B. R. M.* 18 *Jac.* 1. *Cra. J.* 590.

(b) *B. R. T.* 28 *Et* 29 *Geo.* 3 *Wils.* 224. and stated *supra*, p. 267.

(c) *Co. Litl.* 42. a.

1781.

GOODTITLE
against
BILLING-
TON.

[758]

Le Blanc, for the defendants, contended, that, whether the daughter took at first an estate-tail, or only an estate for life, the remainder over to the widow was barred by the recovery. If she took an estate-tail, the case was clear; but, if she only took an estate for life, then, he said, the limitation to the widow was upon a contingency with a double aspect; it was a concurrent remainder in fee, created in the alternative, with a contingent remainder in fee to the daughter; and, a recovery having been suffered by the tenant for life, every body was barred but the heir at law, which the daughter herself was in this case. He insisted, that it was impossible to distinguish this case from those of *Luddington v. Kime* (a), *Doe v. Holme* (b), and *Godright v. Dunham* (c); that the second limitation to the daughter was capable of taking effect as a contingent remainder in fee, and, of course, that to the widow was so; and it was an established maxim, that, whenever an estate can take effect as a remainder, it shall not be construed to be an executory devise [2].—He also said, he meant to argue, that, if the limitation to the widow should be held to be an executory devise, yet it ought to be considered as limited on an indefinite failure of issue, and, therefore, too remote; but Lord MANSFIELD said, it was impossible to maintain that position, for that the words clearly confined the failure of issue to the time of the daughter's death.

Lord MANSFIELD.—The rules and principles laid down by Mr. *Le Blanc* are indisputable. It is perfectly clear and settled, that, where an estate can take effect as a remainder, it shall never be construed to be an executory devise, or bringing use. Here, the first limitation is to two persons and the survivor, so that a preceding freehold will be in the survivor, and the estate over is limited on a contingency upon which a remainder may depend. It is to the daughter and her heirs, (not issue,) if she should marry and have issue, and it must have taken effect after the death of the survivor. There is another contingency, on the event of the daughter dying unmarried and without issue, (not on failure of her issue,) and, upon that event, the limitation to the widow in fee. But the tenant for life, by the recovery, has barred the contingent remainders.

The *Posse* to be delivered to the defendants.

(a) C. B. E. 9 W. 3. 1 Ld. Raym.

(c) M. 20 Geo. 3. *supra*, p. 264.

3. 1 Salk. 224. 3 Lev. 431. and
noted *supra*, p. 265.

[2] In *Pells v. Brown*, the limitation over could not enure as a remainder, because it was limited on the defeasance of a defeasible vested fee.

(b) C. B. T. 11 & M. 12 Geo. 3.
Will. 237. 241. 2 Blackst. 777. and
noted *supra*, p. 265.

1781.

Friday,
29th June.RIGHT, Lessee of MITCHELL and his Wife,
against SIDEBOTHAM and Another.

By the following devise,
viz. "I give
" and devise
" to A. her
" heirs and assigns
" for
" ever, all my
" lands at B.
" and I give
" and be-
" queath to
" A. afore-
" said all my
" lands at C."
A. only takes
an estate for
life in the
lands at C.
and the rever-
sion thereof
shall descend,
although the
will begin
with these in-
trodutory
words, "For
" those world-
" ly goods
" and estates
" wherewith
" it has pleas-
" ed God to
" bless me,"
and contain a
legacy of 1*l*.
to the heir at
law.

ON an ejectment, tried at the last Spring Assizes for the county of Oxford, before HEATH, *Justice*, a special verdict was found, which stated: That one *William Sparrowhawk*, being seised in fee-simple of the premises in question, on the 10th of February 1758, made and duly executed his will, and, thereby, devised as follows:—"For those worldly goods and estates wherewith it has pleased Almighty God to bless me, I give and dispose in manner following. *Imprimis*, I give and bequeath to my sister *Susannah Mitchell*, one *shilling*. *Item*, I give and bequeath to *John Mitchell*, son of *Susannah Mitchell*, one *shilling*, to be paid by my executrix herein-after named, within three months after my decease. *Item*, I give and bequeath to my loving wife *Susannah Sparrowhawk*, all the rest of my goods and chattels, and personal estate whatsoever. Also, I do give and devise unto *Susannah Sparrowhawk*, my said wife, her heirs and assigns for ever, all my lands lying in the parish of *Bampton* in the *Bush*, in the county of *Oxford*, and now in the occupation of *Mary Sparrowhawk* of *Aston*, in the parish aforesaid. And I give and bequeath to my loving wife aforesaid, all my lands, tenements, and houses, lying in the parish of *Chipping Norton*, (to wit) the house I now live in, the Sign of the *Plough*, standing between the houses of *W. W.* and *T. A.* and now in my occupation, with the yard, garden, and out-houses, and all other appurtenances thereto belonging. Lastly, I do make and constitute *Susannah Sparrowhawk*, my said wife, full and sole executrix of this my last will and testament."—That the testator died seised in fee, on the 20th of September 1766, leaving the said *Susannah Mitchell*, one of the lessors of the plaintiff, his only sister and heir at law; and that the testator's widow married the defendant *Sidebotham*, and died on the first of November 1777.

The question upon this special verdict was, Whether the last-mentioned premises in the will, were, by the true construction thereof, devised to the widow in fee, or only for life?

Caldécott, for the plaintiff, insisted, that only a life estate in those premises was given by the will, and that the reversion expectant on the death of the widow, had descended to *Susannah Mitchell*, the testator's sister and heir at law. He said, it was clear, that, by the words of the devise taken by themselves, nothing was given but an estate for

1781.

RIGHT
AGAINST
SIDERO-
THAM.

life, and the court would hold themselves bound by the legal operation of the words, and not indulge uncertain conjectures about the intent of the testator. The circumstances from which an intent to give an estate in fee might be attempted to be inferred, on the part of the defendants, were, first, the general introductory words at the beginning of the will, viz. "For those worldly goods and estates, &c." and, secondly, the legacy of one shilling to the heir at law. The first, it might be said, indicated a determination to dispose of the complete interest in every thing the testator had in the world [107], and the other a resolution to disinherit his heir. But, as to the introductory words, they are almost of course in wills, and are merely descriptive, and not meant to relate to the quantity of interest given in the things devised; and, as to the supposed disinheriting clause to the heir at law, it must be considered, that the interest of the heir at law, is, in no case, derived from the bounty of the testator, but from the disposition of law, and it is sufficient for his title, if the testator, either does not give the whole to another person, or, designing perhaps to do so, executes his design with so much uncertainty, and so insufficiently, as that it cannot be taken notice of by a court of law. The cases he relied upon were, *Denn, Lessee of Gaskin v. Gaskin*, B. R. M. 18 Geo. 3. [† 163], and *Roe, Lessee of Callow & others, v. Bolton*, C. B. M. 16 Geo. 3.—The first came on in the form of a special case, which stated, that *John Gaskin*, being seised in fee, by his will, after prefacing, "As to such worldly estate as it hath pleased God to endue me with," devised as follows: "I give and bequeath all that my freehold messuage and tenement lying in G. in the parish of D. together with all houses, farms, edifices, and appurtenants, reputed as part thereof, or belonging to the same, to *Matthew Robinson*, *George Robinson*, and *Thomas Robinson*, equally to them my sister's sons;" That the will then proceeded to give several pecuniary legacies, of different amounts, to different relations, and, among others, ten shillings to the lessor of the plaintiff; That the testator died seised in fee, and, afterwards, *Matthew* and *George Robinson* died; That *Thomas Robinson* was alive, and that the lessor of the plaintiff was the testator's heir at law. The main question was, whether the three nephews took an estate in fee, or only for life; and it was argued, for the defendant, that they took an estate in fee, as must be collected from the prefatory words, and the legacy to the heir at law; but Lord MANSFIELD said, though he

[761]

[107] In *Maunder v. Maunder*, B. "with it hath pleased God to bless R. T. 8 Geo. 2. Lord Hardwicke laid "me." Ca. Temp. Lord Hardw. great stress on similar words, viz. "In 142, 143. 2 Str. 1020, 1021. "respect to my worldly estate where- [† 163] Since reported, *Cowp.* 657.

1781.

RIGHT
against
SIDEBO-
THAM.

he suspected the testator's intent was to give the whole interest, as he did not appear to have had any *other lands* [1], and had given a disinheriting legacy to his heir at law, the court could not connect the prefatory with the devising clause; and, in the devising clause, there were not any words by which the court would be warranted in construing it to be an entire disposition of the estate. WILLES, Justice, was absent; but ASTON, and ASHHURST, Justices, concurred, and ASTON mentioned a case of *Right, Lessee of Shaw & another, v. Russell*, in the court of Exchequer, H. 1 Geo. 3. where introductory words, like those in the present case were held to be mere matter of form, and not material; and the day after he brought his note of that case into court, and read it, and it appeared, that the will there began, "As touching the disposition of such personal estate as it has pleased God to bestow on me," and then the testator proceeded to give his house to his son *Samuel Russell*, and after his death, then to the two sons of *Samuel, Thomas*, and *William*, and then, at last, gave a legacy of *one shilling* to the husband of his heir at law; and the determination was, that *Thomas* and *William* only took for life, and that the reversion descended; and ASTON, Justice, observed, that that was a stronger case than *Denn v. Goskin*, because, if *Samuel* had survived his two sons, they would have taken nothing by the will. In *Roe, Lessee of Callow & others, v. Bolton*, there were these introductory words in the will: "As touching such worldly estate wherewith it hath pleased Almighty God to bless me with." The testator then gave all his real and personal estate to his wife for life, and then came this devise; "Item, I give unto my son *Paul Cardale*, all that my land lying and being in the parish of *Dudley*, in the county of *Worcester*, near unto a certain place called *Tinsley Hall*, into three parts divided, at or immediately after my wife's decease." Then came several legacies of personal and leasehold property to his son *Isaac Cardale*, and his daughter *Elizabeth Mason*, after his wife's death, and then followed this clause; "Item, my will is, that all my grand-children that are living twelve months after my wife's decease, shall have five shillings each of them, as a token of the love that I bear unto my generation [1]." The lessors of the plaintiff were the testator's heirs at law, being his grand-daughters

[762]

[1] And therefore it was not necessary to distinguish those devised, by local description.

[1] This state of the will in the case of *Roe v. Bolton*, was taken by Mr. Caldecott, (who favoured me with it,) from an office copy furnished him by his client. If that copy was

correct, there is a singular omission of the word "my" in the account of the case in 2 *Blackst.* 1045, where the court are mentioned to have taken notice of the testator's having assigned a whimsical reason, viz. "his love to generation," for giving the legacies to his grand children.

daughters by his eldest son *William Cardale*, and the question being, whether *Paul Cardale* took an estate for life or in fee, the court held, that he only took an estate for life; yet in that case, likewise, there was the same sort of introductory clause as here, and also a disinheriting legacy.—After stating the two foregoing cases, *Caldecott* observed, that it appeared, that the testator knew the technical words necessary to create a fee, having used them in the first branch of the devise, and, therefore, he must be considered as having designedly omitted them in the other; nay, that the very circumstance of making two branches of the devise, showed a design to give different interests, since, if he had meant to give the same estate in all the premises, one set of words would have answered the purpose.—He also cited the cases of *Swayne v. Fawkenor* & another, *Executors of Middleton* (a), and *Bevisson v. Hussy* (b).

Bower, for the defendants, contended, that the intention was clearly to give the whole interest. The testator not only begins by expressing the purpose of disposing of all his property, but uses the double precaution of giving legacies both to his heir at law and her son. In the case of *Cole v. Rawlinson* (c), words sufficient to carry a fee-simple in the first part of a devise, were connected with a subsequent part, so as to make that an estate in fee, which would otherwise only have been for life, by the opinion of *POWELL, POWYS, and GOULD, Justices*, against Lord *HOLT*. The words were, “I give, ratify, and confirm all my estate, right, title, and interest which I now have, and all the term and terms of years, which I now have, or may have in my power to dispose of after my death, in whatever I hold by lease from *Sir John Freeman*, and also the house called the *Bell Tavern*, to *John Billingsly*.” The copulative word “and,” in that case, was held sufficient to carry the preceding words, “all my estate, right, title, and interest,” over to that part of the devise which respected the house called the *Bell Tavern*. In this present case there are, in like manner, words expressive of a fee-simple interest in the first branch of the devise, and that branch is connected with the other by the same copulative “and.” That material circumstance was wanting in the case of *Den v. Gaskin*. In short, if the interposing words in the second branch of the devise in question, between the copulative and the description of the premises thereby devised, viz. “I give and bequeath, &c.” were wanting, there could be no doubt. It would then be an express devise in fee; and the unnecessary use of those words cannot have the effect of defeating the clear intent of the testator.

1781.

RIGHT
against
SIDES-
THAM.

[763]

(a) *Dqm. Proc. Show. Parl. Ca.* 207. 385. 562.
Skinn. 339.

(c) *B. R. H.* 1 *Ann.* 1 *Salk.* 234.

(b) *B. R. M.* 6 *W. & M. Skinn.* 2 *Ld. Raym.* 831.

1781.

RIGHT
against
SIDERO-
THAM.

As to *Roe v. Bolton*, the reasoning of the court, as stated by Mr. Justice BLACKSTONE, is rather in favour of the present defendants, for they clearly thought, that a legacy to an heir at law indicating an unequivocal intent to disinherit him, would be sufficient to give to words like those in the present case, the effect of carrying a fee-simple. No serious argument can be drawn from any supposed knowledge this testator had of the technical operation of words, since, in the first branch of the clause in question, he uses the expression "*devise*," instead of "*devise*."

Lord MANSFIELD;—I verily believe, that, in almost every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. "All my estate" or "all my interest" will do: But "all my lands lying in such a place" is not sufficient. Such words are considered merely as descriptive of the local situation, and only carry an estate for life. Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else [C]. I have no doubt but the testator's intention here was to disinherit his heir at law, as well as in the case of *Den v. Goslin*; but the only circumstance of difference between that case and this, and which has been relied on as in favour of the defendants, if the testator had any meaning by it, (which I do not believe he had,) rather turns the other way, because he uses different words in devising two different parts of his estate. I think we are bound by the case of *Den v. Goslin*, and the other cited in that case by Mr. Justice ASTON.

WILLES, Justice;—In *Cole v. Rawlinson*, (which, however, was decided against the opinion of Lord HOLT,) the whole devise was in one sentence: It was all one devise.

BULLER, Justice;—It is impossible for us to make this only one devise, when the testator has made it two.

Judgment for the plaintiff [† 164].

[C] S. P. Ca. Temp. Lord Hardw.

143.

[† 164] *Vide Ibbotson v. Beckwith*,
Canc. M. 1735. Ca. Temp. Talb. 157.
Roe v. Blackett, B. R. H. 15 Geo. 3.
Cowp. 235. *Hogan v. Jackson*, B. R. T.
19 Geo. 3. Cowp. 299. 306. *Loveacres*
v. Blight, B. R. M. 16 Geo. 3. Cowp.
352. *Frogmorton v. Wright*, C. B. E.
13 Geo. 3. 2 Blackst. 889. *Stiles v.*
Walsford, C. B. H. 14 Geo. 3. 2 Blackst.

938. *Goodright v. Allen*, C. B. M. 16
Geo. 3. 2 Blackst. 1041. *Macara*
v. Tall, Canc. 1753. *Ambl.* 181. *Tif-*
nell v. Page, Canc. 1740. 2 *Atk.* 37.
Rogers, lessee of *Dawson*, *v. Briggs*,
B. R. E. 11 Geo. 2. *Andr.* 210.
Holdfast v. Martin, B. R. M. 27 Geo.
3. 1 *Term Rep.* 411. *Fletcher v. Smith*,
B. R. M. 29 Geo. 3. 2 *Term Rep.*
656.

1781.

CHANCELLOR *against* POOLE.Friday,
29th June.

ACTION of covenant for rent in arrear.

The declaration stated, a demise, by indenture, under seal, from the plaintiff, to one *Burrough*, his executors, administrators and assigns, for twenty-one years, containing the usual covenant, by *Burrough*, for himself, his executors, administrators, and assigns, for payment of the rent, and, also, a mutual covenant, that the lease should be determinable at the end of the first 7, or first 11 years, at the option of either party, giving six months notice to the other. The declaration then stated; that, afterwards, by deed-poll, between *Burrough*, the plaintiff, and the defendant, he, the said *Burrough*, by and with the consent of the plaintiff, testified by his executing the said deed-poll, bargained, sold, assigned, and set over to the defendant, his executors, administrators and assigns, as well the aforesaid indenture of lease, and the messuage, &c. thereby demised, as all the estate, right, title, interest, &c. of him the said *Burrough* therein, to hold to the said defendant, his executors, administrators, and assigns, for all the unexpired residue of the 21 years, in as large and ample a manner, and form, to all intents and purposes, as he the said *Burrough*, his executors or administrators, might, could, or of right ought to have held or enjoyed the same, had the said deed-poll never been made, he the said defendant, his executors, administrators, or assigns, paying the rent, and performing the covenants, in the said indenture of lease mentioned, and indemnifying him the said *Burrough*, his executors, and administrators, against the same; that it was, by the said deed-poll, agreed between the plaintiff, the defendant, and *Burrough*, that the said term of 21 years should be and continue an absolute lease to the end of that term, and, therefore, they did release each other from the covenant in the lease contained, for the sooner determining the same; that the defendant, afterwards, by virtue of the said deed-poll, entered and became possessed, &c.; that the plaintiff had always, since the making the said last-mentioned deed, performed every thing in the said indenture of lease, and in the said deed-poll, contained, on his part to be performed. Then an assignment of a breach of covenant, by the defendant, by the nonpayment of half a year's rent, which became due at *Christmas*, 1780.

Plea, that, before the rent so in arrear, or any part of it, became due and payable, viz. on the third of September 1779, the defendant assigned the demised premises, and all his estate and interest therein, to one *Bucholl*, his executors,

The assignee of a term, declared against as such, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed, thereby, that the term, which was determinable at his option, should be absolute.

[765]

1781.

CHANCELLOR
against
POOLE.

executors, administrators, and assigns, to hold, from the 29th of September 1779, for the remainder of the said term, by virtue of which said assignment, *Bucholl*, afterwards, and before any part of the rent aforesaid became due and payable, viz. on the said 29th day of September 1779, entered and became possessed, &c.

General demurrer.

The question, on this record, was, whether, upon the state of the case as set forth in the declaration, the defendant was to be considered as having become an immediate lessee under the plaintiff, by the operation of the deed-poll, or, at least, as having thereby covenanted personally with the plaintiff, for the payment of the rent; or whether he was only an assignee, with a mere derivative title from *Burrough* the first lessee. If the defendant was a lessee, or had covenanted personally with the plaintiff, he was liable for breaches of covenant happening after the assignment of his interest; because, though the privity of estate was gone, the privity of contract still remained between him and the lessor. If he was only an assignee, there never was any privity of contract between them, and, therefore, he ceased to be liable, as soon as his assignment to *Bucholl* put an end to their privity of estate.

[766]

Wood, for the plaintiff, contended, that, from the circumstances of the plaintiff's being a party to the deed-poll, and his agreeing, that the term should continue absolute for the residue of the 21 years, the court ought to consider this case as very different from that of a common assignment. The deed-poll was, in truth, a new grant from the plaintiff; at least the clause in it, by which it is declared, that the defendant shall hold the premises in as ample a manner as *Burrough*, "he the defendant paying the rent," ought to be construed to be a covenant from the defendant, personally to the plaintiff, for the rent. And there is a good consideration, on the face of the deed-poll, for such a covenant, namely, the enlargement of the interest in the term, by making it absolute instead of defeasible. Now, though an assignee, merely as such, is not liable to the covenants longer than while he keeps the estate, yet he may make himself liable by a new covenant with the lessor, inserted for that purpose in the deed of assignment. No particular set of words is necessary to make a covenant. Any form of expression amounting to an agreement, if under seal, is sufficient. This has been repeatedly determined; *Hill v. Carr* (a), *Brice v. Carr* (b), *Hollis v. Carr* (c) [1].

Mingay,

(a) *Canc. M. 28 Car. 2. 1 Ca. in*
Chanc. 294.

(b) *B. R. M. 13 Car. 2. 1 Lev.*

47.

(c) *Canc. E. 28 Car. 2. 2 Mod. 86.*

[1] This is the same case with *Hill v. Carr*, only in an earlier stage. The name of the plaintiff is mistaken in *Cases in Chancery*.

Mingay, for the defendant, insisted, that this was a mere assignment. The clause relied upon on the part of the plaintiff, if it amounts to a covenant, is only a covenant with *Burrough*. Who is stated on the record as the party granting to the defendant? Not the plaintiff, but, *Burrough*.—"He the said *Burrough* bargained, sold, assigned, &c."—If there had been any intention of a covenant between the plaintiff and the defendant, there could have been no occasion for stipulating that the defendant should indemnify *Burrough* against the payment of rent.—*Mingay* then stated that there was, in the original lease, a clause restraining the lessee from assigning without the consent of the plaintiff, though it had not been mentioned on the record; that it was on account of that clause, that it had been thought proper to make the plaintiff a party to the deed-poll; and, if the court should think that a material part of the case, he would move for leave to amend the plea, by inserting it.

Lord MANSFIELD,—I think *that* would make no difference. The question is, whether the plaintiff is a contracting, or merely an assenting, party, in the deed-poll.

ASHHURST, *Justice*.—The plaintiff seems to me to have decided against himself, for he has stated this as an assignment. If he had meant to avail himself of it, as a contract between the defendant and himself, he should have stated it according to the legal operation [2], and as a demise from the plaintiff to the defendant.

BULLER, *Justice*.—It strikes me, that, if the plaintiff had considered the deed-poll as a new lease, and the defendant as his immediate lessee, he had no occasion to state the first lease in his declaration. He seems to have concluded himself.

Lord MANSFIELD,—There is a covenant by the defendant for paying the rent in the deed-poll; but it is with the lessee,

Judgment for the defendant.

[2] *Supra*, p. 667.

The KING against the INHABITANTS of WIVELINGHAM.

Saturday:
30th June.

BY an order of two justices, *Mary Bittany*, widow, and *Mary* her daughter, were removed from the parish of *Haddenham* in the isle of *Ely*, to the parish of *Wivelingham* in the county of *Cambridge*; and, upon an appeal,

An estate being devised to trustees to be sold to pay debts, and to divide the surplus, if any, between

A. B. and *C.*, *A.* has an equitable interest in the estate, and by residing upon it forty days, gains a settlement.—*A. B.* is not a purchase within 9 Geo. 1. c. 7.

1781.

CHANCEL-
LOR
against
POOLE.

[767]

1781.

The KING
against
WIVELING-
HAM.

[768]

appeal, the court of Quarter Sessions confirmed the order, stating the following case :

Robert Bittany, the late husband of *Mary Bittany* one of the paupers, came, with the said *Mary*, and *Mary* their daughter, from the parish of *Wivelingham*, to the hamlet of *Aldreth* in the parish of *Haddenham*, with a certificate from the parish of *Wivelingham*, dated the 12th of December 1750, which acknowledged him and *Mary* his wife, and also *James* and *William* their children, to be inhabitants legally settled in *Wivelingham*. *Robert Bittany* continued at *Aldreth* between five and six years, when he returned to *Wivelingham*, where he remained between twelve and thirteen years. He then went and resided at *Aldreth* upon an estate he acquired in the following manner.—One *Elizabeth Bittany* being seised in fee of a copyhold messuage or tenement in *Aldreth* holden of the manor of *Haddenham*, duly surrendered the same to the use of her will, and, being also seised of a freehold dovecote and piece of land in *Aldreth*, by her last will, bearing date the 13th of April 1768, devised in the words following;—" I give and devise all that my copyhold
" messuage or tenement wherein I now dwell, with the
" appurtenants thereto belonging, also my freehold dovecote,
" house, and the piece of land which the same now
" stands on, unto *T. S.* and *R. W.* and to their heirs,
" in trust, to be sold as soon as conveniently can be after
" my decease, for the best price or sum that can be got
" for the same, and the money arising from the sale
" thereof, (over and above the charge and expences of
" selling the same,) to be equally divided between *Robert*
" *Bittany* and the three daughters of *William Bittany*
" deceased, share and share alike."—*William Bittany*, in the will mentioned, was the elder brother, and *Robert Bittany* a younger brother, and they were the nephews of the testatrix. Upon her death, which happened about 12 years ago, *Robert Bittany* took possession of the copyhold messuage. By indentures of lease and release, of the 24th and 25th of May 1768, the release being made between *T. S.* and *R. W.* the two devisees, of the first part, *Jane Bittany*, spinster, *John Aungier*, and *Mary* his wife, late *Mary Bittany*, spinster, and *Elizabeth Bittany*, spinster, of the second part, and *Robert Bittany* of the third part—Reciting the will of *Elizabeth Bittany*, and that the said *Jane Bittany*, *John Aungier*, and *Mary* his wife, *Elizabeth Bittany*, spinster, and *Robert Bittany*, had agreed, with the consent and approbation of *T. S.* and *R. W.* that the said *Jane Bittany*, *John Aungier*, and *Mary* his wife, and *Elizabeth Bittany*, should take, and (accordingly they did take,) the ready money of the said *Elizabeth Bittany*, the testatrix, amounting to 60*l.* (after all her just debts

debts and funeral expences were satisfied,) for their shares, and that *Robert Bittany* should take the said dove-house and piece of ground for his share.—It was witnessed, that, in consideration of the said agreement, *T. S. and R. W.* did, thereby, grant, bargain, sell, and convey, unto the said *Robert Bittany*, the said freehold piece of ground, with the dove-house thereon erected, to hold to him, his heirs and assigns for ever. In the said release, there was a covenant from *T. C. and R. W.* for quiet enjoyment, and to make further assurances, and a covenant from *Jane Bittany*, *John Aungier*, and *Mary* his wife, and *Elizabeth Bittany*, to *Robert Bittany*, his heirs and assigns, that, for the further performance of the said agreement, and for quieting him in the possession, not only of the said freehold piece of ground, dove-house and premises, but also of the copyhold messuage and premises with the appurtenants, and for extinguishing any claim they, or any of them, might challenge or demand, of, in, or to, the same, as heiresses at law of the said *Elizabeth Bittany*, or otherwise howsoever, they did thereby remise, release, and for ever quit claim, unto the said *Robert Bittany*, all manner of right, title, trust, property, claim, and demand whatsoever, of, in, to, or out of, the said freehold premises, and also of, in, to, or out of, all and singular the said copyhold premises; and, thereby, severally promised to do any further act or deed, for continuing the said copyhold messuage and premises to the said *Robert Bittany*. No farther conveyance of the copyhold premises was made by the other parties in the said indentures named, to *Robert Bittany*; but, at a court holden for the manor of *Haddenham*, on the 17th of *April 1770*, *Robert Bittany* was admitted in fee to the said messuage or tenement, with the appurtenants, as cousin and heir at law [1] of *Elizabeth Bittany*. He resided in the said messuage, and continued in the uninterrupted possession and quiet enjoyment of the said freehold and copyhold estates, to the time of his death, being about 11 or 12 years, and was, during that time, assessed, and paid to the land-tax; but the said premises were not, at any time, of the value of 30*l.* and they are, at this time, agreed to be sold for 15*l.*

Howorth shewed cause against quashing the orders. The question, he said, was, whether the residence of *Robert Bittany*, the pauper's husband, at *Aldreth*, was such a residence upon his own property, as would discharge the certificate, and gain a settlement. He admitted, that residence on an estate in which a man has only an equitable interest is sufficient; but he contended, that *Robert Bittany* had taken no interest of any sort in the lands, by the will, neither

1781.

The King
against
WIVELLING-
HAM.

[769]

[1] He was cousin, but not heir at law, of an elder brother. The grand-nieces being the chil-

1781.

The KING
against
WHEELING-
HAM.

[770]

neither legal nor equitable. He had only a right to call upon the trustees to sell the estate, and distribute the money arising from the sale. As to what interest he took by the conveyance from the trustees and the other legatees, that was a *purchase* within the meaning of the statute of 9 Geo. 1. c. 7. and, the whole being under the value of 30*l.* he could not, thereby, have discharged the certificate, or have gained a settlement.

A. Pemberton, on the other side, contended, that Robert Bittany had clearly an equitable title under the will; that all the *cettui que trusts* had agreed that the trustees should not sell; and that it is clearly settled, that a residence on one's own estate, coming either by descent or devise, whether the legal interest is coupled with the equitable or not, and whatever the value is, will gain a settlement, and discharge a certificate [1]. If the certificate was discharged in this case, that was sufficient, for then a settlement was gained by the assessment and payment of the land-tax.

Lord MANSFIELD mentioned the case of *Roper v. Radclyffe* (a), to shew, that a devisee of the surplus arising from the sale of lands after payment of debts and legacies, has an equitable interest in the lands themselves, it being in his option, to pay the debts and legacies, and keep the land.

WILLES, Justice, said, the same question, as in this case, had occurred in *Rex v. Natland* (b), which was referred to GOULD, Justice, when upon the circuit, who decided, that a settlement was gained; and that his opinion had been, afterwards, recognized by the court.

Both the orders quashed [+ 165].

[1] Vide *Rex v. Marwood*, H. 29 Geo. 2. *Burr. Settl. Ca.* No. 124. and *Rex v. Ingleton*, E. 6 Geo. 3. *Ib.* No. 179.

(a) *Dom. Proc.* 1713. 9 *Mod.* 167. 181. *Bac. Abr. Tit. Papists*, vol. 3. p. 795.

(b) *M.* 15 Geo. 3. *Burr. Settl. Ca.* No. 247.

[+ 165] In *Rex v. North Curry*, M. 22 Geo. 3. the court determined, that a person *solely* entitled to administration, but in whom the whole would not have vested for his own use, having resided 40 days on a leasehold reversion of the intestate, for a term of years determinable on lives, did not thereby gain a settlement.

[771]

Saturday,
30:h June.

GOODRIGHT, Lessee of ALSTON, against
WELLS and Others.

If the legal
interest in
land descend
in fee simple
ex parte ma-
ternâ, and the equitable interest in fee simple *ex parte paternâ*, or *vice versa*, the paternal
estate shall merge in the legal, and both follow the line through which the legal estate
descended.

THIS ejectment was tried before Lord MANSFIELD, in
Middlesex at the Sittings after last *Easter Term*, and
a verdict found for the plaintiff, subject to the opinion of the

the court, on a case, which, as far as is material to be stated, was as follows:

James Selby, Serjeant at law, agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made of it to him, having by his will, [made subsequent to the agreement,] devised—"All the rest of my real and personal estate whatsoever, and wheresoever, to my said wife in trust, that she do thereout educate and maintain my said son, until he shall attain the age of 21 years, and until he shall have sufficiently settled and secured to, and upon, my said wife, what is to be settled upon, and given to, her as aforesaid, and, afterwards, in trust, to convey and dispose of all the then rest of my real and personal estate, and the produce thereof, to my said son, his heirs, executors, and assigns; but, in case my said son shall die without issue before he shall attain his said age of 21 years, then in trust, &c."—After the testator's death, a conveyance by lease and release, of the estate in question, was made to *Mrs. Selby* the widow, who died before the son attained his age of 21 years, which he afterwards did attain, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the statute of mortmain (a). The lessor of the plaintiff was his heir at law *on the part of the mother*, and the defendants his heirs at law *on the part of the father's mother*.

The case was argued on *Friday*, the 29th of *June*, by *Wilson*, for the plaintiff, and *Batt*, for the defendants.

Wilson,—The question depends on the manner in which the son took; whether by descent from the father, or from the mother. He cannot have taken the legal estate by descent from the father, because *he* was never seised. Suppose the father had devised the equitable estate to a stranger, and the legal conveyance had, afterwards, been made, (as now,) to the widow in fee, and she had died, the *cetui que trust* must have called on the heirs of the mother, not those of the father, for a conveyance of the legal estate. Then, if the equitable estate descended from the father to the son, (which, however, I do not admit, because of the devise to the mother,) both the legal and equitable interest met in him; and, after his death, the legal estate certainly descended on the lessor of the plaintiff, as his heir *ex parte maternâ*. But, it will be said, that he is only a trustee for the heirs *ex parte paternâ*; that the two estates separated on the death of the son, and took different courses, the beneficial interest descending in the paternal line. I believe such a doctrine

1781.

GOOD-
RIGHT
against
WELLS.

[772]

(a) 9 Geo. 2. c. 36.

1781.

The King
against
WRELLING-
HAM.

[770]

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[771]

Saturday,
30th June.

GOODRIGHT, Lessee of ALSTON, against
WELLS and Others.

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interest in
land descend
in fee simple
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James Selby, Serjeant at law, agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made of it to him, having by his will, [made subsequent to the agreement,] devised—"All the rest of my real and personal estate whatsoever, and wheresoever, to my said wife in trust, that she do thereout educate and maintain my said son, until he shall attain the age of 21 years, and until he shall have sufficiently settled and secured to, and upon, my said wife, what is to be settled upon, and given to, her as aforesaid, and, afterwards, in trust, to convey and dispose of all the then rest of my real and personal estate, and the produce thereof, to my said son, his heirs, executors, and assigns; but, in case my said son shall die without issue before he shall attain his said age of 21 years, then in trust, &c."—After the testator's death, a conveyance by lease and release, of the estate in question, was made to *Mrs. Selby* the widow, who died before the son attained his age of 21 years, which he afterwards did attain, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the statute of mortmain (a). The lessor of the plaintiff was his heir at law *on the part of the mother*, and the defendants his heirs at law *on the part of the father's mother*.

The case was argued on *Friday*, the 29th of *June*, by *Wilson*, for the plaintiff, and *Batt*, for the defendants.

Wilson,—The question depends on the manner in which the son took; whether by descent from the father, or from the mother. He cannot have taken the legal estate by descent from the father, because *he* was never seised. Suppose the father had devised the equitable estate to a stranger, and the legal conveyance had, afterwards, been made, (as now,) to the widow in fee, and she had died, the *cettui que trust* must have called on the heirs of the mother, not those of the father, for a conveyance of the legal estate. Then, if the equitable estate descended from the father to the son, (which, however, I do not admit, because of the devise to the mother,) both the legal and equitable interest met in him; and, after his death, the legal estate certainly descended on the lessor of the plaintiff, as his heir *ex parte maternâ*. But, it will be said, that he is only a trustee for the heirs *ex parte paternâ*; that the two estates separated on the death of the son, and took different courses, the beneficial interest descending in the paternal line. I believe such a doctrine

1781.

GOOD-
RIGHT
against
WELLS.

[772]

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1781.

GOOD-
RIGHT
againſt
WELLS.

is not countenanced by any authority. There is no caſe where the legal eſtate and equitable intereſt, after they have both veſted in fee-ſimple in the ſame perſon, have been held to ſeparate again, unleſs ſuch perſon has done ſome poſitive act to ſever them. Mr. *Selby*, the ſon, did no act which could have that effect. If there were a doubt on this ſubject, and it could be ſuppoſed that the leſſor of the plaintiff ought to be conſidered as a trustee, the queſtion is proper for another judicature. But how can any truſt be raiſed in this caſe? There is no conſcience to turn the ſcale; no intention, on the part, either of Serjeant *Selby*, or his ſon, in favour of one ſet of heirs, in preference to another. The father only meant to give the whole intereſt in the eſtate to the ſon, and did not think about the courſe of deſcent from him; and the ſon's intention was, that neither ſet of heirs ſhould have it, but a charity. The only queſtion then is, (ſuppoſing the equitable eſtate to have come by deſcent from the father to the ſon,) whether equity ſhall follow the law, or draw the law after it. When the court of *Chancery* had a ju- riſdiction over uſes, the Chancellor uſed to enquire how the legal eſtate would go in a court of law, and directed the uſe to go in the ſame courſe. Here the legal eſtate goes *ex parte maternâ*; and, therefore, the equitable intereſt ſhall do ſo likewiſe. But, did the equitable eſtate deſcend from the father to the ſon? If the will had ſtopped ſhort at the deviſe to the mother, there would have been no doubt that it did not. As it now ſtands, the whole was deviſed to her in words, and it was neceſſary that ſhe ſhould have the fee-ſimple, to enable her to perform the truſts. If the ſon had lived till 21, and the mother, on his making the ſettlement upon her required by the will, had conveyed to him, he would have taken both the legal and equitable intereſt, by *purchase* from her, and, as he did not, and no ſuch conveyance was made, he took both from her by *deſcent*. I have found no deciſion on this ſubject in the books, but I have been informed of a caſe, viz. *Doe*, leſſee of *Balch*, v. *Putt & others*, which was determined in the court of *Common Pleas*, in *Trinity Term*, 8 *Geo. 3.* the circumſtances of which were theſe:—It was an ejeſtment tried before HEWITT, *Juſtice*, at the *Aſſizes* for *Somerſetſhire*, and a ſpecial verdict found, which ſtated, that *Mary Mortimer*, being ſeiſed in fee of an eſtate of which the premises in queſtion were an undi- vided moiety, on her marriage, conveyed to trustees and their heirs, to the uſe of them and their heirs, upon truſt, to permit her to receive the rents and profits to her ſe- parate uſe during life, and to grant and convey the eſtate, or any part thereof, to the uſe of ſuch perſon or perſons in fee, or otherwiſe, as ſhe, whether married, or ſole, by

[773]

deed, or will, should appoint, and, for want of such appointment, to the use of the husband for life, remainder to her first and other sons in tail, remainder to her daughters in tail, as tenants in common, remainder to her right heirs; that the marriage took effect, and she died, leaving her husband and an only daughter, an infant; that the husband afterwards died, and then the daughter died, being still under age, and without issue; that the lessor of the plaintiff, and one *Newton*, were the heirs at law of the daughter *ex parte maternâ*, (being the sons of two deceased sisters of the mother,) and that, on the daughter's death, they entered on the estate; that the lessor of the plaintiff, and the surviving trustee, by lease and release, reciting as above, and that *Newton* had, for a certain sum, agreed to purchase the lessor of the plaintiff's moiety,—had, in consideration of the stipulated price, conveyed that moiety to *Newton* in fee; that, on the same day, by lease and release, also reciting as above, the trustee had conveyed the other moiety in fee to *Newton*; that *Newton* died seised of all the estate, leaving the lessor of the plaintiff his heir at law *ex parte maternâ*, and the defendants his heirs at law *ex parte paternâ*. The question on the special verdict was, Whether the moiety conveyed by the surviving trustee alone to *Newton*, (for which moiety only the action was brought,) belonged to the lessor of the plaintiff, or to the defendants [1]? The court unanimously decided in favour of the latter, though it was contended, that the legal estate should follow the old use, which had come to *Newton* by descent *ex parte maternâ*.—This case seems to be directly in point, for *Newton* took nothing by purchase from the trustee but the mere legal estate; yet it was determined, that the whole should descend from him in the paternal line, as in other cases of purchase.

Batt.—Surely it cannot be doubted but the equitable estate descended from the father to the son, notwithstanding the interposition of the estate devised to the wife, because, on the mother's death and his coming of age, being both devisee and heir at law, he was in of his better title. The intent of the creator of the trust was, that the son should take an estate to himself and his general heirs; that was a trust proper to be carried into execution; and, although courts of law have no direct jurisdiction for the execution of trusts, they take notice of them to a certain degree,

[1] I have compared the above state of the facts in this case with an office copy of the record of the special verdict. Each had first gone into Chancery, and the facts were stated in his bill, and submitted by the defendants in their answer; but the Master of the Rolls

would not decide the question, but made an order retaining the bill for a twelvemonth, with liberty to the plaintiff "to assert his right by an ejectment," in consequence of which the action was brought. *Vide supra*, p. 344. Note *.

1781.

GOOD-
RIGHT
against
WELLS.

[774]

1781.

GOOD-
RIGHT
against
WELLS.

degree, and will not suffer mere trustees to defeat their *cettui que trusts*, or recover against them in ejectment. Uses and trusts were originally the same. Both rested on a confidence in the terretenant, and it is supposed, by many respectable authorities, that it is only from the great liberality which has prevailed in the courts of equity, for the last century, that any distinction has been made between them.—(Lord MANSFIELD,—“It was not the liberality of the courts of equity, it was the absurd narrowness of the courts of law, resting on literal distinctions, which in a manner repealed the statute of *uses (a)*, and drove *cettui que trusts* into equity.”)—Before the statute of *uses*, the use was considered, in most respects, as the complete ownership of the land. The estate of the feoffee was subservient to that of the *cettui que use*, and the former could do nothing to defeat the interest of the latter, unless by alienation for a valuable consideration without notice. The statute completed the subserviency, by consolidating the legal estate with the use. By analogy to *uses* thus considered, trust estates have been held to be the solid and substantial ownership of the land, and trustees the mere instruments of conveyance. To apply this doctrine: A trust was, here, created by Serjeant Selby, the owner of the estate, in his widow, for the benefit of his son, which she did not live to execute. If she had lived, the son, or his heir *ex parte paternâ*, if he himself had died first, might have compelled her, or her heir, (the present lessor of the plaintiff,) to execute it, and, before it had been executed, neither she nor her heir, could have set up the legal estate in an ejectment. If she had conveyed to the son, the whole interest would, then, undoubtedly have descended to the paternal heirs; and shall the omission and non-fesance by her, as a trustee, of an act, which, had she lived, it was her duty to perform, work so very material an injury to them? *Lex nemini facit injuriam*. Why should a descent from a trustee produce an injury, by operation of law, which the trustee could not have produced by a conveyance in her life-time? This is contrary to the nature of descents, and the principle of *remitters* already alluded to by which, if a party has two titles, the law considers him as taking by the best. It is said, there was no trust, after the two estates united in the son; and that they cannot afterwards separate, and descend in different lines, unless some act is done to sever them. But no case has been cited to prove that position; the paternal heirs are the more worthy in the eye of the law; the father meant the estate to go to them, as being the general heirs; therefore the lessor of the plaintiff ought to be considered as taking

1775]

(a) 27 Hen. 8. c. 10.

taking subject to a trust for them. I have not been able to find any account of the reasons of the court of *Common Pleas*, in giving judgment in the case of *Doe v. Putt*, and it is not easy to conjecture upon what ground they went. According to a note which I have seen of the arguments of *Davy* and *Glynn*, Serjeants, the reasoning of the former on behalf of the defendants was very far from being satisfactory [2]. Indeed the case seems to me not to be distinguishable from the common one of a legal estate called in to complete a title. When a mortgage is satisfied, but no reconveyance takes place till after the death of the mortgagor, and then his heir calls in his legal estate, can it be said that the conveyance to him alters the course of descent? Upon the whole, there being, in this case, a lawful trust created for the paternal heirs, by one who had a complete dominion over the estate, the trustee is bound not to defeat it, and the court will not permit him to avail himself of his legal title against it, or to turn the *cettui que trust* round for relief to a court of equity.

Wilson, in reply,—It is true, I have not cited any authority to prove, that, when the legal and equitable estates unite, some act must be done to sever them; but it follows from the nature of the thing. The terretenant has the estate, in confidence that he will suffer the *cettui que use*

[2] I have seen the note to which *Batt* referred, and it appears, by it, that *Davy*, Serjeant, contended, that the conveyance of the legal estate by lease and release from the trustee, coupled with the original conveyance to the trustees, operated in the same manner as a feoffment by a tenant *ex parte maternâ* to the use of his maternal heirs, and a reinfestment of him by the feoffee, which, even though expressed to be to the use of *those heirs*, shall, of necessity, enure to those *ex parte paternâ*. He also insisted, that there was a manifest intention in *Newton* to alter the course of descent of his own moiety; the one, purchased by him from *Balch*, clearly descended in the paternal line; he could not mean that *Balch* should inherit the other, but must have designed that both should go in the same course; nor could any other motive be assigned for his taking the conveyance from the trustee. At any rate, he said, the lessor of the plaintiff had no legal interest, and, therefore, he must enforce his right,

if he had any, in equity.—(This last argument sounds a little oddly in a case which, though there were no controverted facts, had been sent out of a court of equity to be decided at law.) —*Glynn*, Serjeant, on the contrary, contended, that the conveyance by the trustee enured to the old use, and operated as a feoffment by a tenant *ex parte maternâ*, which would enure to the use of the maternal heirs without any declaration to that purpose. He admitted the law, as to a reinfestment, to be as stated by *Davy*, but said that case was peculiar.—The authorities cited on both sides were, *Bacon on Uses*, 1 *Inst.* 13. a. *Martin v. Tregonwell*, 2 *Str.* 1179. and 1 *Wils.* 2. 66. 2 *Lill. Reg.* 11. *Nelson's Abr.* title *Descent*, 11 *Edwards v. The Countess of Warwick*, 2 *P. Will.* 171. *Chudleigh's Case*, 1 *Co.* 120. *Price v. Langford*, 1 *Show.* 92. *Salk.* 337. and *Carth.* 140.—The case had been argued in the preceding term, (*E. 8 Geo.* 3.) by *Jephson* and *Lee*, Serjeants,

1781.

GOOD-
RIGHT
against
WELLS.

[776]

1781.

GOOD-
RIGHT
against
WELLS.

use to enjoy the profits; but, if he is *cestui que use* himself, such confidence cases, and the use, or trust, merges. There will be no injury done in this case. An injury is where a person is deprived of a right; and, here, the paternal heir had no right; neither complete nor inchoate: Neither *jus in re*, nor *ad rem*. I admit, that, if a conveyance had been compelled, the estate would have gone to the paternal heirs, because, then, the son would have been a purchaser, in which case, by a known rule of law, the descent is always in the paternal line.—(WILLES, *Justice*,—"I should wish to have it argued, "whether the lessor of the plaintiff did not take the legal estate charged with the trust, which was for the paternal heirs, they being understood by the word '*heirs*.' "Is there any case to shew that the trust is extinguished? It seems to me, that it would be very unjust.")—I own I can see no injustice, because it appears that Mr. Selby, the son, did not mean that either class of heirs should have the estate. While an ancestor, tenant in fee-simple, lives, the heir has no interest. The word "*heirs*" in a conveyance, only means to describe the extent of the interest, and to carry the complete ownership. Now, if *cestui que trust* of all has also the legal estate, there is nothing left to be the subject of a trust.

[777]

The court took till this day to consider, when they delivered their opinions, to the following effect:

Lord MANSFIELD, (after stating the case,)—Serjeant Selby, after his purchase, was owner of the equitable estate, and had a right to go into *Chancery* to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance, on the condition of the son's living till 21, and making a certain provision for her, was to be absolutely in trust for him. He outlived his mother, and, on her death, the trust estate was completely vested in him, (the subsequent limitations in the will being on contingencies which never happened,) and the legal estate descended to him from her. The question is, To whom the whole estate descended on the death of the son? for it did *descend*, the devise to charitable uses being void. If it descended from the mother, the lessor of the plaintiff takes as heir at law. But, it was contended, that, though he is heir, there is a trust for the paternal heirs; and it was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *cestui que trust*. When this was mentioned on the trial, I said, as I did the other day in the case of *Doe v. Poit (a)*, that this rule is subject to the qualification, of its being *clearly* the case only of a mere trust, for then, by taking notice of it, the court prevents delay

(a) *Supra*, p. 721, 722.

delay and expence; but it will not decide when there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said, there might, perhaps, be cases on the subject, and the parties wished to have the opinion of the court. Now, who is to be considered as heir at law on this ejectment? It would be sufficient, for the judgment which I shall deliver, to say, that it is *not a clear case*, that the lessor of the plaintiff is a mere trustee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out some observations, to show, that it is not only doubtful, but that the inclination of my opinion is, that you cannot support such a trust. A case so circumstanced, in every particular, probably never existed before, and, perhaps, never may happen again. But, cases must often have happened on which the general question would arise; viz. Whether, when *cettui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estate shall open on his death, and be severed for the different heirs? Consider it, *first*, upon authority; and, *secondly*, upon principle. 1. No case has ever existed where it has been so held; none where the heir at law of one denomination, has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. 2. On principle, it seems to me impossible; for the moment both meet in the same person, there is an end of the trust. He has the legal interest, and all the profits, by his best title. A man cannot be a trustee for himself. Why should the estates open upon his death? What equity has one set of heirs, more than the other? He may dispose of the whole as he pleases, and, if he does not, there is no room for *Chancery* to interpose, and the rule of law must prevail. The case in the *Common Pleas* is an authority, if it went on this ground, and I am told it did. There, the *cettui que trust* taking the legal estate as a purchaser, the descent was altered. *Quâcunque viâ datâ*, therefore, the lessor of the plaintiff is entitled. If the question is doubtful, then, in this court, the legal right must prevail; and, if the weight of opinion and argument is, that the legal estate must draw the trust after it, the case is still stronger against the defendants.

WILLES, *Justice*,—I entirely agree with my Lord as to the legal estate, but my doubt is, what is become of the equitable use. Let us see how the facts stand. The money was paid by the father, but he died before any conveyance, devising, as stated in the case. Now, what was the ancient use? It was to the heirs *ex parte paternâ*. I

1781.

GOOD-
RIGHT
against
WELLS.

[778]

1781.

GOOD-
RIGHT
against
WELLS.

[779]

do not agree, that there is no difference as to the different heirs. When the question is between those of the paternal and those of the maternal line, the law always gives the preference to the former. After the father's death a conveyance was made to the widow and her heirs, in trust. So, the estate in her was not absolute, but charged with the trust. Suppose the son, in his life-time, had called in the legal estate, and become a purchaser, there is not a doubt, but, in that case, the paternal heirs would have succeeded. There having been no such conveyance to him, the legal estate descended to him from the mother. But I think he took it clothed with the trust, and subject to the ancient use. I do not say he was a trustee for himself, but this ancient use remained uncontrolled, and revived, as between the different heirs, on his death, no act having been done to alter it. If, therefore, the question were to come before me in another court, I should decree a trust in the lessor of the plaintiff. But he certainly is entitled to the legal estate, and that is enough here.

ASHHURST, *Justice*,—We all agree, that, if there is a doubt as to the trust, the lessor of the plaintiff is entitled to the estate in this court, and, therefore, it is not necessary to give any opinion on the other point. But, as it has been moved, I will mention, that I am inclined to be of opinion, that the trust, as well as the legal estate, shall go to the heirs *ex parte paternâ*. To support the contrary position, it must be said, that the son took as trustee for himself and his paternal heirs, for I do not see how the estate shall open for the heirs, if he was not himself a trustee. I never knew any case where the court held, when an estate came by descent, that the heir was a trustee although the ancestor was not. The case in the *Common Pleas* goes a great way to determine this question; for it shews, that, where the trust and legal estates join, they shall both go according to the legal estate.

BULLER, *Justice*,—I am entirely of the same opinion with my Lord, and my brother ASHHURST, on both points. On the first, we are all agreed. As to the second, it is observable, that no case has been cited, nor do I believe any ever existed, where, in a court of equity, an heir of one sort has been determined to hold as trustee for an heir of the other sort. In a court of law, try the question by the principle stated by Mr. *Batt*, viz. that where two titles unite, the party shall be in of the best. What is the better title here? The clear fee-simple estate which descended from the mother. I think there is a mistake in taking the heirs on either side into consideration. They had no interest during the life of the ancestor; the whole was in him. The only person to be considered

considered is the ancestor, who was seised in fee both of the legal and equitable estate. A case has been put, which does not in my opinion vary the question, viz. the case of the son's having called for a conveyance. However, as the mother died before he came of age, and she was not directed to convey till then, that case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal estate by purchase, the paternal heirs would have been entitled, but, as he took it by descent from his mother, (and the case would have been the same if we suppose her to have lived beyond his age of 21, and that he never called for a conveyance,) I think the trust was merged and gone.

The *Possea* to be delivered to the plaintiff [† 166].

[† 166] *Vide Price v. Langford, B. 337. Cruise Essay on Fines, 47, 48. R.E. 2 W. & M. 1 Show. 92. 1 Salk.*

1781.

GOOD-
RIGHT
against
WELLS.

[780]

CLEGG and Another against MOLYNEUX and Another.

Monday,
2d. July.

IN Michaelmas Term, 21 Geo. 3: on Monday, the 13th of November, Walker, Serjeant, obtained a rule to shew cause, why the Master's *allocatur* of the costs taxed for the plaintiffs in this action should not be vacated, and why he should not tax the defendants their costs on the *Possea*.

The case had been argued in the beginning of last Hilary Term, but I was not in court. It then stood over till this day, it being understood, that there was, for some time, a difference of opinion among the Judges.

Lord MANSFIELD now stated the case, and delivered the unanimous opinion of the court, to the following effect.

Lord MANSFIELD,—This is an action of trespass *quare clausum fregit*. The first count states, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet, in walking, trod down, spoiled and consumed, and dug up, and got, divers large quantities of turf, peat, sods, heath, stones, soil, and earth, of the plaintiffs, in and upon the place in which, &c. and took and carried away the same, and converted and disposed of the same to their own use. There is another count, upon a similar trespass, in another close. The defendants have pleaded the general issue to the whole declaration, and two special pleas to the second count; and, on the trial, a verdict has been found for the plaintiffs, on the general issue, with 11. damages, and for the defendants, on the special pleas; and the Judge has not certified. The question, on this record,

On trespass for breaking the plaintiff's close, and digging up the soil upon the place in which, &c. and taking and carrying away the same, if the defendant plead not guilty, and a verdict is found for the plaintiff, but with damages under 40 s. and the Judge does not certify, the plaintiff shall have no more costs than damages.

1781.

CLEGG
against
MOLY-
NEUX.

* [781]

record, is, Whether the plaintiffs are intitled to any more costs than damages under the statute of 22 & 23 Car. 2. c. 9. § 136 (a)? There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the Reports; and, as the question * is a general one, we thought it proper to consult all the Judges; and they are all of opinion, that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode, a qualification, of the injury done to the land. The trespass is laid to have been committed on the land by digging, &c. and the *asportavit* as part of the same act; and, on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property where the freehold cannot come in question, and which, therefore, is not within the act. Thus, after trees are cut down, and, thereby, severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute, because the freehold cannot come in question. Here it might.

The rule made absolute as to vacating the *allocatur* of the plaintiffs costs [+ 167].

(a) Or *ft.* 2. c. 5. § 149.

Tolly, B. R. E. 27 Geo. 3. 1 Term Rep.

[+ 167] *Vide Cockerell v. Allanson*, 655, 656.B. R. T. 22 Geo. 3. *Cotterill v.*

Monday,
2d July.

BERMON *against* WOODBRIDGE.

An insurance on a ship and goods,—at and from A. to B, during her stay and trade there, at and from thence to her port or ports of discharge in C. and at and from thence back to A,—is an *entire* contract, and, if the loss happen at any time after the commencement of the risk, there shall be no return of *premium*.

ON the first day of this term, *Lee* obtained a rule to shew cause, why there should not be a new trial in this cause, which had come on before Lord MANSFIELD, at Guildhall, at the Sittings after last *Easter Term*, when the jury found a verdict for the defendant.

The case was this: It was an action on a policy of insurance, on the French ship *Le Païole*, and her cargo, and the voyage was described in the policy in the following words:—"At and from Honfleur, to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur."—The clause respecting the *premium* was as follows:—"Slaves valued at 800 *liv. tournois* per head; the ship at 1450*l.* sterling; other goods, &c. as interest may appear; at *premium* of 11*l.* per cent."—The ship sailed to Angola, and from thence, after staying some time there, to the West Indies. On her way from Angola, she put in at Cayenne on the coast of America, and from Cayenne went to Martinico, confessedly out of the course of St. Domingo.

1781.

BARNON
against
WOOD-
BRIDGE.

The only witness called by the counsel for the plaintiff, was the captain. He swore, that, in pursuing the direct course from *Angola* to *St. Domingo*, he must have passed close to *Cayenne*, but that his putting in there was unpremeditated, and from necessity: that his bowsprit was broken on the passage from *Angola* towards that place, by the violence of the weather: his provisions, too, had run short, although he had been originally fully victualled, owing to an unusual and unexpected delay in watering on the coast of *Angola*, and because his voyage towards *Cayenne* had been protracted by the accident which had happened to his bow-sprit: that the loss of time in watering arose from his being deprived of the assistance of the crews of the *English* vessels, an accommodation which is constantly given in time of peace, and which it had not been foreseen that he would be deprived of, as the hostilities between the two nations had not taken place till after his departure from *France*: that, when he left *Angola*, he thought he had sufficient provisions for the *St. Domingo* voyage; for, notwithstanding the delay there, he had enough to last six weeks, which was more than the usual length of that voyage, though it sometimes lasts three months: that some of his water-casks were staved on the way from *Angola*: that, when he left *Angola*, he did not mean to put in any where between that and *St. Domingo*: that, when he was at *Cayenne*, he found it necessary to proceed from thence to *Martinico*, in order to get a supply of provisions there, and that he might avoid the *English* privateers, which were very numerous in the course of the direct passage to *St. Domingo*: that he meant to have pursued his voyage from *Martinico* to *St. Domingo*, in order to take in his homeward-bound cargo of sugars there, according to his original destination; but, that, after he had been there a few days, an embargo was laid on, and continued for seven months, so that it became necessary for him to part with his cargo of negroes at that island, (which he did for a price of 3000*l.* sterling under what they would have fetched at *St. Domingo*,) and that he was obliged to take sugars in payment, no money, or good bills, being to be had: that, after the embargo was taken off, he sailed with the convoy for *St. Domingo*, but not to *St. Louis*, his intended port of discharge, but to *Cape Francois*, a port in another part of the island, such being the general orders for the convoy: that, at the end of four days, his ship being a slow sailer, he lost sight of the convoy, but still persisted for some time in sailing towards *Cape Francois*: till his officers represented to him, in the most urgent manner, the danger of pursuing that course any further, on account of the swarms of privateers, which would unavoidably fill those seas, as soon as it

[783]

1781.

BERMON
against
WOOD-
BRIDGE.

it should be known that the convoy was gone by: that on these representations, he determined to alter his course and strike into the direct way to *Honfleur*, which he accordingly did, and was sailing towards that port when he was taken. To corroborate the testimony of the captain, besides reading his protest, which was to the same effect with his evidence, a certificate from the directors of the colony of *Cayenne* and *French Guiana* was offered to be produced, stating the motives which had induced him to put into that port. Lord MANSFIELD was clear, that this was not admissible evidence for the plaintiff; but, having desired to look at it, and having himself read it, he said, as it had been offered on the part of the plaintiff, it might be read as evidence against him, and it was accordingly read, and was in these words:—"We attest, that the said captain touched here for want of water, and that it was not possible for him to find, in this colony, provisions to be purchased, of which he was much in want."—This certificate, which must be taken to have been founded on the captain's own account at *Cayenne*, his Lordship thought inconsistent with his evidence, because it made no mention whatever of his bowsprit having been broken. The defendant called no witnesses, and Lord MANSFIELD left it to the jury, to consider whether the deviation in the voyage from *Angola* to *St. Domingo*, by putting into *Cayenne* and going to *Martinique* was wilful or necessary. They were clearly of opinion that it was not necessary. Upon their declaring that opinion, as there was a count in the declaration for money had and received, the counsel for the plaintiff contended that the voyage insured ought to be considered as composed of three distinct parts, or voyages; viz. 1. From *Honfleur* to *Angola*; 2. From *Angola* to *St. Domingo*; 3. From *St. Domingo* to *Honfleur*; and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from *St. Domingo* to *Honfleur*. Lord MANSFIELD took the opinion of the jury also upon that point, and they were clear there ought to be no return. Next day, however, his Lordship said, he had turned that question in his mind and entertained some doubts upon it, and, as it was a question of law, desired Lee to move for a new trial upon that ground. The motion was made on both grounds viz. 1. On the question of fact, whether the deviation was wilful; 2. On the question of law, whether, supposing it wilful, there ought to be a return of premium.

On Saturday, the 30th of June, the case was argued by Lee, Howorth, and Douglas, for the plaintiff; and the Attorney General, Dunning, and Bower, for the defendant.

1781.

BERMON
against
WOOD-
BRIDGE.

In support of the verdict, it was insisted, 1. On the first point, that the certificate produced, entirely discredited the captain, and that it was manifest he must have sailed from *Angola* with the intent of going to try the market at *Martinico*; for it could not be believed, that he had set sail on a voyage which might last, according to his own account, for three months, with provisions only for six weeks: That this was a mere question of fact and credit, and properly left to the jury, and their judgment upon it ought to be conclusive. 2. On the second point, it was contended, that the description in the policy was of one entire voyage, and one entire risk, and that, in such cases, no return is ever to be made after the risk has once commenced. That this had been decided in a variety of cases, but, particularly, in *Tyrie v. Fletcher* (a) [† 168], and *Loraine v. Tomlinson* (b).—In *Tyrie v. Fletcher*, the policy was upon the ship the *Isabella*, “At and from London to any port or place, where or whatsoever, for twelve months, from the 19th of August 1776, to the 19th of August 1777, both days included, valued at 1000*l.* for account of A. B. the master, and others that may be concerned with him, at 9*l.* per cent. warranted free from captures and seizures by the Americans, and the consequences of any attempts thereof.” The ship was taken by an American privateer, on the 13th of October 1776, and the plaintiff brought his action for a return of premium, in the proportion of ten-twelfths of the whole, the risk having ceased before the expiration of the second of the twelve months. The cause was tried before Lord MANSFIELD, at *Guildhall*, and a verdict found, by consent, for the plaintiff, in order to take the opinion of the court, whether there ought to be an apportionment and return of premium; if there ought not, a nonsuit to be entered. The case was solemnly argued, and the cases of *Stevenson v. Snow* (c), and *Bond v. Nutt* (d), relied on, by the counsel for the plaintiff. But the court were clearly of opinion, that there ought to be no return; that the case was similar to an insurance upon a life for a year, with an exception of death by suicide, where, if the life insured is put an end to by suicide within the year, there never is any return of premium; that the contract was entire, and, when so, whether for a specified time, or for a voyage, there shall be no apportionment nor return, if the risk has once commenced; and that the opinion of the court, in *Stevenson v. Snow*, and *Bond v. Nutt*, went upon there being two distinct risks [1], which there

[785]

(a) B. R. E. 17 Geo. 3.

[† 168] Since reported, *Cowp.* 666.(b) H. 21 Geo. 3. *supra*, p. 583.(c) B. R. M. 2 Geo. 3. 3 Burr. 1237. 1 *Blackst.* 315. 318.(d) B. R. E. 17 Geo. 3. *supra*, p.367. *Note*, col. 1.[1] In *Bond v. Nutt*, the reasoning of the court went upon there being a divisible risk, or two risks united in the same

1781.

BERMON
against
WOOD-
BRIDGE.

there certainly were in those cases, but not in this. In the present case, if the parties had chosen to do so, they might have made three insurances in one policy, by dividing the voyage into three distinct parts and risks. There is no long voyage where that may not be done. But this contract is not so. It is on a voyage from *Honfleur* back to the same port, by *Angola* and *St. Domingo*. Many of the policies on our *East-India* voyages run in the same way, and there is never any return of *premium* on them, in whatever part of the voyage the loss happens. The difficulty of apportioning the *premium* is insurmountable. The risk varies every day, and hour, in time of war; and it is impossible to ascertain how much shall be appropriated to each different part. The *premium* is mentioned in the gross—1 *l.* per cent.—on the whole voyage; not in separate distinct sums for different parts of it.—*Dunning* said, he had advised the action in the case of *Tyrie v. Fletcher*, having then an idea, that *Stevenson v. Snow* had been decided on the broad ground, that there should be a return in all cases where the risk could be ascertained to have ceased before the end of the voyage insured; but that, on the argument of *Tyrie v. Fletcher*, it came out, clearly, that the judgment in *Stevenson v. Snow* had gone upon the ground of there being two voyages.

[786]

For the plaintiff, it was contended, 1. That the certificate produced was not at all inconsistent, or incompatible, with the captain's evidence. It did not follow, because the reason of want of water was there stated for his putting into *Cayenne*, that he had not also other reasons for adopting that measure. The captain alone was examined. He spoke to facts and motives within his own knowledge; and the jury could not disbelieve him, without imputing perjury to him, which they had no right to do in a case where there was no incongruity in his evidence, and he was not contradicted, nor his credit impeached, by any other witness. The verdict was founded in part upon his evidence; for, as he was the only witness on either side, the fact of the supposed deviation could only be gathered from what he swore; and, if one part of his testimony was to be adopted, the whole ought. If an affidavit, or an answer in *Chancery*, is read in evidence, it cannot be mutilated, and part received and part rejected; but the whole must be taken together. 2. As to the return of *premium*, it is certainly most reasonable, that there should be nothing paid for that part of a voyage, in which no risk is run by the underwriter. This seems to follow from the very nature of a contract of mere

same policy; but I believe no question was agitated in court about a return of *premium*; for the defendant, in that

case, had tendered the whole *premium*, and it was taken out of court by the plaintiff before the trial.

mere indemnity, which a policy of insurance is; and, in *Stevenson v. Snow*, the determination went upon that general principle, not merely on there being two voyages. The cases of *Tyrie v. Fletcher*, and *Lovaine v. Thomlinson*, were upon time; and, in such cases, the reason why there shall be no return, is, that, from the nature of the thing, it is impossible to ascertain the degree of risk in the different portions of the time insured. But, where the insurance is upon a voyage, consisting of different parts, from port to port, there is nothing so easy, because the respective premiums for the voyage between all the different ports mentioned in the policy are always known and settled. If there were any thing in the supposed difficulty of apportioning the premium in time of war, it ought to be considered, that the war had not commenced when this contract was entered into. But, if it were necessary for the plaintiff to shew, that, by the very words of the policy, there were three different voyages insured, surely they are as distinctly marked out here, as the two were in *Stevenson v. Snow*. The words "at and from," are repeated three times, which would have been unnecessary, if one entire voyage, and one entire contract, had been in contemplation. In short, the form of expression here is fully as descriptive of several successive voyages, as the words of the policy were in *Stevenson v. Snow*, and indeed much more so, if they were as stated in Mr. Justice BLACKSTONE's report of the case; for, according to him, the words of that policy run, "*Warranted to depart with convoy for the voyage (a),*" not as stated by Sir James Burrow, "*Warranted to depart with convoy from Portsmouth for the voyage (b).*" In all cases where there is an insurance on an outward-bound voyage, and also on the homeward-bound voyage from the ultimate port at which the homeward-bound cargo is to be taken in, though in the same policy, the division into two voyages, and two risks, is obvious and natural; insomuch that, by the French ordinance of 1681, which is, in some measure, a digest of the general law of merchants relative to maritime causes, it is expressly provided, that a fixed proportion of the premium shall be returned, if the homeward-bound voyage never commence. "*Si l'assurance est fait sur marchandises pour l'aller & le retour, et que le vaisseau, étant au lieu de sa destination, il ne se fasse point de retour, l'assureur sera tenu de rendre le tiers de la prime, s'il n'y a stipulation contraire (c).*" There, too, the words are, "*assurance pour l'aller & le retour*" are much less expressive of a divisible risk, than those used in the present policy.—Lee mentioned a case of *Scott & others*

1781.

BERMON
against
WOOD-
BRIDGE.

[787]

(a) 1 Blackst. 315.

(b) 3 Burr. 1327.

(c) Ordonn. de la Mar. 1681. Art. 6.

1781.

BERMON
against
WOOD-
BRIDGE.

[788]

others v. Rae, tried before Lord MANSFIELD, at Guildhall, as directly in point. The insurance, there, was, "at and " from Grenada to Boston, in New England, and from " thence back to Grenada and London." The ship sailed from Grenada to Boston, and from thence to Goldborough, in New England, and from Goldborough, directly to London, and Lord MANSFIELD held, that the contract was capable of being severed, that there ought to be a return of premium, proportioned to the risk from Goldborough back to Grenada, and from thence to London, and that this proportion might be ascertained, and had been proved by a witness to amount to 3l. per cent. [1].—*Houworth* stated, that in the case of *Lavabre v. Walter* (a), the under-writers were so well satisfied that the risk might be apportioned, that they had voluntarily made a return of premium.

Lord MANSFIELD said, the reason why he had desired the motion to be made on the point concerning the return of premium, and why he should now direct that the case should stand over till the court should consider of their opinion, was, that, in all mercantile transactions, it is infinitely more important that the law should be certain and uniform, than that, at first, it should be one way or the other.

This day, his Lordship delivered the opinion of the court, to the following effect:

Lord MANSFIELD,—The motion for a new trial in this case, is made upon two grounds: 1. That the verdict is against evidence: 2. That there ought to be a return of premium for the voyage from *St. Domingo* to *Honfleur*.—1. There was but one witness examined,—the captain,—and he did give evidence, that he was forced to go into *Cayenne* and *Martinico* on account of the breaking of his bow-sprit, and the deficiency of provisions, and averred that the whole was occasioned by inevitable necessity. If this was true, there was no deviation in point of law; but there were many suspicious circumstances in his evidence and the jury expressly found, on the specific question being put to them, that his going out of the direct course was wilful, not necessary. They thought, that, when he sailed from *Angola*, he did not intend to go to *St. Domingo*, but meant to try the *Martinico* market. It is said, that, as the

[1] Nobody at the bar recollected this case. *Lee* cited what Lord Mansfield said, from a note taken on the back of the brief at Guildhall, by Mr. *Thoresby*, who was attorney for one of the parties, and who has favoured me with the perusal of the brief, from which it appears, that there was a warranty in the policy, that the ship should depart from Grenada for London,

on or before the 1st of August 1772 so that, according to the original contract, and independant of the agreements mentioned *infra*, p. 790. there were two risks, viz. one absolute, from Grenada to Boston and back to Grenada and another conditional, viz. from Grenada to London, in like manner as in the case of *Bond v. Nutt*.

(a) *M.* 20 Geo. 3. *supra*, p. 284.

1781.

BERMON
against
WOOD-
BRIDGE.

[789]

case rests entirely on his evidence, you must take it altogether, and believe the whole; but though the whole of an affidavit, or answer, must be read, if any part is, yet you need not believe all equally. You may believe what makes against his point who swears, without believing what makes for it. It was an extraordinary circumstance, that the ship should be so soon in want of water, and a very suspicious one, that she should fall short of provisions. How came the captain to set out on such a voyage so scantily provided? Then, there was a piece of evidence, which, though not admissible for the plaintiff was very strong against him. This was the certificate, which was obtained out of the regular course of business, and manifestly intended to be a justification; and yet mentions nothing of the loss of the bow-sprit, which the captain stated, on his examination, as his principal reason for going to *Cayenne*. There are also other strong circumstances. But, if this point was doubtful, who but the jury were to decide upon it? No new evidence is pretended. It is not pretended, that the plaintiff has any of the crew to produce, to explain, or corroborate, the captain's testimony. If we were to grant a new trial, on the ground of the verdict being against evidence, it would be sending the cause back to a jury, with an intimation that they ought to believe the captain. We are all, therefore, against granting a new trial on this ground.—2. If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases, (though my opinion has fluctuated,) we are, now, all clearly of opinion, that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on the voyage, or whether it is to be split into six different risks? for, by splitting the words, and taking “at” and “from” separately, it will make six; viz. 1. At *Honfleur*; 2. From *Honfleur* to *Angola*; 3. At *Angola*, &c. The principles are clear. Where the risk has never begun, there must be a return of premium; and, if the voyages, in this case, are distinct, the risk from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exceptions of suicide, and the hands of justice, if the party commit suicide, or is executed, in twenty-four hours, there shall be no return. The case is the same, if a voyage insured once begun. Is this one entire risk? The insured and underwriters consider the premium as an entire sum for the whole, without division: It is estimated on the whole at 1 per cent. And, which is extremely material, there is

1781.

BERMON
against
WOOD-
BRIDGE.

[790]

no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the insurance. The argument must be, that, if the ship had been taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the under-writers would have been liable though she had not been so at *Angola*, &c.; but, according to the construction contended for on the part of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur* but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson v. Snow*, and *Bond v. Nutt*, were quite different from this. They depended upon this; that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow*, it depended on the contingency of the ship failing with convoy from *Portsmouth*, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond v. Nutt*, it was held, that there were two risks, upon the same principle. "*At Jamaica*" was one. The other, viz. the risk "*from Jamaica*" depended on the contingency of the ship having sailed on or before the first of August: That was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie v. Fletcher*, and *Loraine v. Thomlinson*, are very strong, for, if you could apportion the premium in any case, it would be in insurances on time. Therefore on very full consideration, we think this one entire risk one voyage; and that there can be no return of premium.

The rule discharged [† 169]

After Lord MANSFIELD had delivered the opinion of the court, as above, he said he had forgot to mention the case of *Scott v. Rae*; that he had no recollection of it, but that it appeared from the brief, which *Lee* had brought in court, that there had been a new agreement with the underwriters, that the ship might go to *Goldborough*: that *Lee* must have looked upon that as a new voyage. *Lee* took notice, that there were two agreements; one, that the ship should load at *Goldborough*, to which the defendant had acceded; another, that she should come directly from that port to *London* without returning to *Grenada*, to which the defendant had not acceded; but Lord MANSFIELD said the first agreement was sufficient to support the determination.

[† 169] *Vide Plantamour v. Staples*, R. E. 25 Geo. 3. *Gale v. Machad*, B. R. M. 22 Geo. 3. *Meyer v. Gregson*, R. E. 25 Geo. 3. B. R. E. 24 Geo. 3. *Long v. Allan*, B.

1781.

The KING against GOUGH.

Tuesday,
3d July.

THE defendant was tried before PERRY, Baron, at the Spring Assizes, in 1777, at Gloucester, on an indictment for perjury. The indictment was found by the grand jury for the county of Gloucester. It stated, that, on the trial of an action brought in the King's Bench, in which the venue was in the county of Gloucester, between Lord Ducie and Doctor Bosworth, at the assizes holden at Gloucester for the said county of Gloucester, the defendant was produced as a witness, and falsely, wilfully, corruptly, and maliciously, did, among other things, depose in substance as follows, &c., whereas in truth, &c. and so the jurors, aforesaid, &c. say that the defendant, &c. at the said assizes held in the said city of Gloucester, in his evidence, committed false, wilful, and corrupt perjury. Then another act of perjury was laid on the same occasion, and at the same time and place. The record then stated, after the appearance of the defendant, and a plea of not guilty, that the sheriff of the said county of Gloucester was commanded to summon a jury of the said county of Gloucester, for the next assizes and general session of oyer and terminer to be holden for the said county of Gloucester, and that, thereupon, such proceedings were had, that, at the assizes and general session of oyer and terminer holden at Gloucester, for the said county of Gloucester, on the 12th of March, 17 Geo. 3. a jury impanelled and returned by the sheriff of the said county of Gloucester, was chosen, tried, and sworn to try the prisoner.

Perjury being committed in the booth-hall, within the limits of the city of Gloucester, which is a county in itself, on the trial of a cause before a jury of the county at large; the indictment may be found and tried by juries of the county at large.—The King cannot, by charter, authorise the trial of crimes out of the county where they were committed.—A new trial may be granted at any time before judgment.

Upon the trial, a *special verdict* was found, which stated:
1. A charter to the burghesses of Gloucester in the first year of Ric. 3. whereby that King granted to them, and their successors, that the town of Gloucester should be "*unus integer comitatus per se corporatus, distinctus, et penitus separatus, a dicto comitatu Gloucestriensi, in perpetuum, et non parcellum infusus comitatus Gloucestriensis; et quod idem comitatus sic corporatus, et a dicto comitatu Gloucestriensi distinctus et separatus, comitatus ville Gloucestrie pro perpetuo nominetur; salva tamen et reservatis nobis, et hæredibus nostris, quod justitiarij ad assizas in comitatu Gloucestriensi capiendas assignandi, justitiarij ad goalam in comitatu Gloucestriensi liberandum assignandi, nec non justitiarij ad pacem in dicto comitatu Gloucestriensi conservandam assignandi, in tenendas sessiones suas, ac etiam vicecomites comitatus nostri Gloucestriensis, in tenendos comitatus suos, liberè possint, et eorum quilibet possit, ingredi villam prædictam, et eandem sessiones et comitatus tenere de quibuscunque rebus et materijs extra dictum comitatum ville Gloucestrie et*

[792]

1781.

The King
against
Gough.

infra comitatum Gloucestriensem emergentibus, sicut ante hæc tempora tenere consueverunt, presenti concessione nostrâ in aliquo non obstante." The charter then declared, that the bailiffs of the town of *Gloucester* should be sheriffs of the county of the town; that they should hold county courts from month to month; that they should exercise all the same powers, &c. belonging to the office of sheriff within the limits of the town, as other sheriffs exercise in their bailiwicks; that all writs, &c. which would have been directed to the sheriff of the county, if the town had not been made a county in itself, should be directed to them; and that no other sheriff or his bailiffs should enter the town to do any thing belonging to the office of a sheriff, except the sheriff of the county of *Gloucester* to hold his county courts as aforesaid: 2. That this charter had been accepted: 3. That it had been confirmed by a charter of 5 *Hen. 7.* and declared to be by authority of parliament: 4. A charter in the 33d year of *Hen. 8.* under the privy seal, and declared to be by the authority of parliament, whereby *Hen. 8.* incorporated the burgesses of *Gloucester*, by the name of the mayor and burgesses of the city of *Gloucester* and city of the county of *Gloucester*, and made it a city, and confirmed to the said city the former grants making it a county in itself: 5. That this charter was accepted: 6. A charter in the 24th year of *Car. 2.* confirming all former privileges contained in prior charters which had been surrendered; and containing a clause in effect the same and nearly the same words with that above set forth from the charter of *Ric. 3.*: 7. That this charter of *Car. 2.* was accepted: 8. That during all the time aforesaid, commissions of *Nisi Prius*, assize, oyer and terminer, and general gaol delivery, had been, from time to time, granted to divers justices, to hear and determine, try and adjudge upon, the several matters and things to such commissions belonging and arising in the said city of *Gloucester*, and to deliver the gaols of the said city; and that other, and separate, commissions, of the same sort, had, from time to time, during all the time aforesaid, been granted to divers justices, to try and determine, &c. upon the several matters and things to such last-mentioned commissions belonging, and arising in the said county of *Gloucester*, and to deliver the gaols of the said county: 9. That the commissions both for the city and the county had been executed at a place in the said city of *Gloucester* called the *Booth-hall*: 10. That, during all the time aforesaid, the jurors for the city had enquired and made presentment of such matters and things belonging and given in charge to the jurors for the city, and arising in the said city of *Gloucester* in the said place called the *Booth-hall*, and that such matters and things so presented by the said jurors, when tried, had been tried by a jury of the said city.

[793]

of Gloucester: 11. That the grand and petty juries for the county had exercised the same jurisdiction as to matters arising within the county: 12. That, during all the time aforesaid, the sessions of the peace for the county had been held in the *Booth-hall*: 13. That the issue in the indictment mentioned had been tried by a jury of the county in the *Booth-hall*: 14. That the defendant, being then and there sworn, did upon his oath, in the said place called the *Booth-hall*, commit wilful and corrupt perjury, in the several matters charged in the indictment.

The objection to this indictment was, that the offence had been committed within the county of the city, and that the juries of the county at large had no jurisdiction to find or try an indictment for any crime not committed in the county at large.

It came on to be argued, on *Wednesday*, the 23d of *May*, by *Beacroft*, for the prosecution, and *Baldwin*, for the defendant.

The court directed *Baldwin* to begin.

He said, the general position was clear, that offenders can only be indicted and tried by juries of that county in which the offence was committed. This nicety was formerly carried so far, that, till the statute of *Edw. 6. (a)*, if a person received a mortal wound in one county, and died in another, the crime could not be tried in either; 1 *Hale's Pl. Cr.* 163. 2 *Hawk.* 220. § 34, 35, 36. 1 *Blackst. Comm.* 303. *Stedman's Case*, *Cro. El.* 137. *Richard Thomas's Case*, *ibid.* (in which, the indictment being, that the defendant at the castle of *Lincoln* falsely deposed, without shewing in what county, he was discharged,) 1 *Salk.* 288. Such being the general principle, the counsel for the prosecutor must endeavour to distinguish this case, by some of the clauses in the charters found by the special verdict. They will probably rely on the clause in the charter of *Ric. 3.* But, by that clause, the justices for the county at large are only authorised to enter into the town, and to enquire of things there which had arisen out of the county of the town. The true meaning of this charter was, to give the use of the *Booth-hall* to the Judges and juries for the county at large, and to authorise their proceedings there, relative to matters within their jurisdiction. At the *Old Bailey*, which is within the city of *London*, juries for the county of *Middlesex* sit to try offences committed in that county; but, when perjury has been committed there on a trial before a *Middlesex* jury, such perjury is never tried by a jury of the county of *Middlesex*, but by one of the city of *London*. In the celebrated case of *Elizabeth Canning*, after a prosecution at the *Old Bailey* for a crime

1781.

The King
against
Goven.

[794]

(a) 2 & 3 *Edw. 6. c. 24.* Vide 1 *Hawk. Pl. Cr. c. 31. § 13.*

1781.
The KING
against
GOUGH.

[795]

a crime committed in *Middlesex*, the indictment of the witnesses for perjury was laid in the city. In like manner, on a trial at bar in *Westminster-hall*, from *Yorkshire* for example, though the cause is tried by a *Yorkshire* jury, if perjury be committed by a witness, he must be indicted and tried by a *Middlesex* jury. In 2 *Hawk. c. 5. § 19.* where this case of *Gloucester* is mentioned, and in the authorities there cited, all that is meant is, that juries of the county sitting in the city may find and try offences committed in the county. The case in *Popham* 16. (also reported in *Anderson* 291.) which will probably be mentioned on the other side, seems to be in favour of the defendant, for the decision only was, that the justices of assize and gaol delivery might sit in the city for things which happened within the county; and, in a note at the end of the case, it is said, that, by the commission for the county, a thing which happens in the town cannot be determined, albeit it be felony committed in the hall during the sessions (a). Considerable pains have been taken to enquire if there is any precedent, or instance, in the city of *Gloucester*, like the present case, and none has been found. No inconvenience will arise, if the court should hold, that this indictment cannot be supported, because the verdict states, that there are grand juries in the city, who may find offences committed in the *Booth-hall*.

Bearcroft, for the prosecution, argued, that the perjury having been committed on the trial of a county cause it must of necessity be taken, that, at that time, the spot where the offence took place was part of the county at large. It is no uncommon thing for the same spot to be considered, for different purposes, as being within different jurisdictions. The space between the high and low water marks, when dry, is within the jurisdiction of the sheriff, but when it is overflowed, the sheriff and Admiralty have *divisum imperium* over it [1]. Before the charter of *Ric. 3.* this spot was clearly part of the county at large. By the statute of 6 *Ric. 2. c. 5.* the justices of assize and gaol delivery are to sit in the county towns of the different counties; by 13 *Edw. 1. c. 30.* trials at *Nisi Prius* are to be held before the Judges of Assize and the authority of the Judge at *Nisi Prius* is by the commission of Assize, as is laid down by Lord Holt *Salk. 454* [† 170]. By giving authority to the Justice for the county at large, to try county causes within the limits of the town, the charter of *Ric. 3.* makes the place where they sat part of the county at large.

(a) *Popb. 17.*

[1] *Vide 1 Co. 107.*

[† 170] 3 *Blackst. Comm. 60.*

1781.

The King
against
Gough.

[796]

for that purpose. The trial on which the perjury was committed was at *Nisi Prius*. The whole proceedings were void, unless the *Booth-hall* be considered as being, at that time, part of the county. All the Judges in *Queen Elizabeth's* time, in the case reported by *Popham*, agreed, that they might sit in the city for county causes, and that the king might, in making a separate county, save and except part of the jurisdiction within it which the county from which it was taken had in it before. By the saving in the charter of *Ric. 3.* all that appertains to, and is connected with, the execution of commissions for the county is necessarily saved. It is true, that a felony committed in the hall during the assizes for the county, must be tried in the city, because such offence is entirely unconnected with the execution of the commissioners for the county. The case in *Popham* is more materially reported by *Anderson*, and he states, that the Judges were of opinion, that it was the intent of the charter, that the town of *Gloucester* should continue, for the purposes mentioned in the exception, to be part of the county at large. It may be true, that indictments for perjury before *Middlesex* juries, at the *Old Bailey*, are laid and tried in *London*, but no inference can be drawn from thence with regard to *Gloucester*. There may be some particular provisions for that purpose in the charters of *London*, which charters are confirmed by act of parliament. Perhaps the prosecution, in the present case, might be in either county. In point of law, the *Booth-hall* was, at the time, in the county at large, and, in point of fact, and local situation, in the county of the city, and, therefore, the offence might be said to have been committed either in the one or other.

Lord MANSFIELD,—It seems to me, as at present advised, to be the better opinion, that the crime might be laid in either county; but the question now before us is, Whether it could be laid in the county at large. The doubt before the Judges, in the case in *Popham*, was, as Mr. Baldwin states it, (*viz.* whether the Judges could sit in the city to try matters arising in the county at large.) But it is material to see how it was solved. In the time of *Ric. 3.* the town was part of the county at large. By his charter it was made a distinct county, but with an exception, that the Judges for the county at large might still try causes there. The King cannot by his charter give Judges a power to try in one county offences committed in another. That was admitted in the case before the Judges as reported by *Anderson*. But, it was answered, that he had continued the city as part of the county at large. If this is so, the cause

1781.

The King
against
Gouen.

cause in which the perjury was committed, was tried in the county at large, and the witness was examined, and the crime committed, in the county at large. This distinguishes the present case from that of the *Old Bailey*, which struck me strongly at first. The city of *London* has many charters and customs confirmed by act of parliament, and the custom of trying offences committed in *Middlesex*, at the *Old Bailey*, has probably been confirmed by act of parliament; for otherwise it would be void.

[797]

WILLES, *Justice*,—If it had not been for the case of the *Old Bailey*, I should have had no doubt; but, with regard to that, there is no occasion to suppose a grant or custom confirmed by act of parliament, because the whole court seems to think, that the indictment may be laid either way, and, at the *Old Bailey*, the usage has been, to lay the indictment in the city.

ASHHURST, *Justice*,—No argument can be drawn from the practice at the *Old Bailey*, unless we knew more exactly how the case stands; there may be an act of parliament enabling the Judges to try matters there, which arise in the county of *Middlesex*. Here, I think, the indictment would have been good either way. The King cannot, without an act of parliament, give the Judges a power to try in one county, facts arising in another. Therefore, the meaning of the charter must have been to continue the town as part of the county at large for the purpose of trying county causes.

BULLER, *Justice*,—I am of the same opinion. There is no way of supporting the judicial proceedings at *Gloucester*, from the time of *Ric. 3.* but by considering them as having been had in the county at large; because I take the law to be clearly as my Lord and my brothers have stated it. We have no authority to compel a jury to come, or to administer an oath, out of the county where the matter arises. Therefore, the meaning of the charter must have been, to leave the place as part of the county at large. I am very strongly inclined to think the indictment might be laid in either, but, if there is a difference, I think this the most proper way [17].

The defendant was this day brought up for judgment, when BULLER, *Justice*, read the report of the evidence, and Dunning was heard on his behalf; after which, the court observed, that, from the state of the evidence, the conviction appeared extraordinary, and hinted that a new trial

[17] In *Bullock v. Barrow*, B. R. E. 27 Geo. 3. it was objected that the *Boothball* was not part of the county for the purpose of executing writs of en-

quiry. But the court held, that there was a foundation for the objection, the party had waived it by appearing there.

trial would be proper. *Dunning* said, he should have made a motion for that purpose, if he had thought it was competent, after such a long interval of time since the conviction. Upon this, Lord MANSFIELD declared, that it was still competent, because the report of the evidence coming regularly now before the court, if enough appeared to raise an inclination in them to think the defendant ought not to have been convicted, they could only grant a new trial, or postpone for ever pronouncing judgment; for that there would be an absurdity in a judgment on a conviction for perjury, where a fine of a shilling should be imposed as the punishment.

A new trial awarded (a).

(a) *Vide Birt v. Barlow, E. 19 Geo. 3. supra, p. 171;*

1781.

The KING
against
GOUGH.

[798]

The End of TRINITY Term, 21 GEORGE III.

THE FIRST EDITION OF THE

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N. B. The letter n., by itself, or followed by a *number*, thus, n. [1], n. [2], &c. indicates that the passage referred to is in one of the notes marked with *numerical characters*; n., followed by another letter, thus, n. (a), n. (b), &c. that it is in one of those marked with *letters*; followed by this mark †, thus, n. [†], that it is in one of those added in the second Edition; and followed by this mark [✱], thus n. [✱], that it is in one of those added in this third Edition.

Where the point mentioned has been determined in any of the cases reported, either in the text or the notes, the name of the case and the term of the year are added; the mark † is prefixed to all the new articles in the second, and the mark ✱ to all those in this third Edition.

A

ABATEMENT.

1. IF an attorney is sued by original, in any action he may plead his privilege in abatement; *Comersford v. Price, H. 20 G. 3. Page 312 to 314*
2. *Vide* INDICTMENT, No. 2. INFORMATION, No. 1. † ATTORNEY, No. 14.

ABANDONMENT.

Vide INSURANCE, No. 10, 12.

ACCEPTANCE, ACCEPTOR.]

Vide BILL of Exchange, No. 1, 2, 3, 6, 7, 8, 9, 10, 15, 17, 23.

ACKNOWLEDGMENT.

1. Evidence of the acknowledgment of the debt by an obligor, does not supersede the necessity of producing the subscribing witness to the bond, in an action on the bond; *Page 216, 217*
2. Nor

A Table of the Principal Matters.

2. Nor in an *action* by the *assignees* of a *bankrupt*, when the petitioning *creditor's* debt arises on a *bond*; *Abbot v. Plumbe*, T. 19 Geo. 3. Page 216, 217
3. An acknowledgment by one of several *drawers* of a joint and several *promissory note*, will take it out of the statute of *limitations* as against any of the other drawers, in a separate *action* on the note against him; *Whitcomb v. Whiting*, E. 21 G. 3. 652, 653
6. Nor against the *captor*, for imprisonment in consequence of a *capture* as *prize*, although the captured ship has been acquitted; *Le Carr v. Eden*, H. 21 G. 3. Page 594 to 613
7. Nor for goods taken on shore as *prize* by the joint operation of a fleet and army; *Lindo v. Rodney*, B. R. H. 22 Geo. 3. 613 n. to 620 n.
8. Nor against a *sheriff* or his officer for having arrested a *certificated bankrupt*, a *discharged insolvent debtor*, a *peer*, a party to a cause, or a *winnefs*, *cundo vel redeundo*; *Tarlton v. Fisher*, E. 21 G. 3. 671 to 677

ACT of Bankruptcy.

Vide BANKRUPT, No. 3, 4, 5, 7, 27, 30.

ACT of Parliament.

Vide STATUTE.

ACTIO non, &c.

1. *Actio non* goes, in every case, to the time of *pleading*, not to the commencement of the *Action*; *Sullivan v. Montague*, H. 19 G. 3. 112
2. But *quere*, as to that point, since *Evans v. Proffer*, B. R. E. 29 G. 3. 112, 113, n. [† 47]

ACTION.

1. An action on the case will lie for suppressing material facts in a *return* to a *mandamus*. 158, 159
2. And if the return is false in substance though it be true in words. 159
3. And against the Bank, &c. for refusing to transfer stock; *Rex v. the Bank of England*, M. 21 G. 3. 524 to 527
4. An action will not lie for a *malicious prosecution*, without shewing, in the declaration, that the original suit is terminated; *Fisher v. Bristow*, T. 19 G. 3. 215
5. An action will not lie, against a *peace-officer*, for *arresting* a person *bonâ fide* on a charge of *felony*, without a *warrant*, although it turn out that no felony was committed; *Samuel v. Payne*, E. 20 Geo. 3. 359, 360

† ACTUAL ENTRY.

1. In what cases necessary; Vide ENTRY.
2. Vide ASSIGNMENT, No. 4, 5.

† ACTUAL Possession.

- † Vide ASSIGNMENT, No. 4, 5.

ADMINISTRATION, ADMINISTRATION.

1. An administrator, having recovered a judgment for a debt due to the intestate, needs not declare as administrator in an *action* on the judgment; *Crawford v. Whittall*, B. R. H. 13 G. 3. 4, n. [1], 5, n.
2. If he does, it is *surplusage*; *Crawford v. Whittall*, B. R. H. 13 G. 3. 4, n. [1], 5, n.
3. And it is no objection on a *special demurrer*, in such case, that he has not made *proferi* of the letters of administration; *Crawford v. Whittall*, B. R. H. 13 G. 3. 4, n. [1], 5, n.
4. The effects of an *intestate* having vested in the King, by a *forfeiture* for *felony*, if the ordinary grant letters of administration to A. in consequence of a *warrant* from the King, and they run in the usual form, viz. "to pay debts, &c." though with this additional clause, "for the use and benefit of his Majesty," A. may be sued by the intestate's creditors, and shall not be permitted to impeach the validity of the letters of administration;

A Table of the Principal Matters.

stration; *Megit v. Johnson*, M. 21 G. 3. - Page 542 to 548

5. *Vide* AMENDMENT, No. 4. APPRENTICE, No. 1. COSTS, No. 5, 6. FEME COVERT, No. 5. LIMITATION of ACTIONS, No. 5. PLEADING, No. 14. SETTLEMENT, No. 3, 4, 19, 20. STOCK, No. 2.

ADMIRALTY.

1. The judge of a court of Admiralty in the Plantations may grant a certificate that there was *probable cause* for the seizure of a ship as a *smuggler*, after the sentence; *Sullivan v. Montague*, H. 19 G. 3. - 106 to 109
2. Such certificate may be granted by the judge of an appellate court of Admiralty; *Sullivan v. Montague*, H. 19 G. 3. - 106 to 109
3. The sentence of a foreign court of Admiralty is *conclusive* against all the world, in all civil suits, as to all matters within its jurisdiction, and decided by the sentence; *Bernardi v. Motteux*, H. 21 G. 3. 575 to 580
4. The jurisdiction over all matters of prize, and every thing consequential to a capture as prize, belongs exclusively to the court of Admiralty; *Le Caux v. Eden*, H. 21 G. 3. 594 to 613. *Lindo v. Rodney*, B. R. H. 22 G. 3. - 613, n. to 620, n.
5. The court of prize in the Admiralty is a different jurisdiction from the ordinary court of Admiralty, called the *Instance* court, and is governed by different rules. - 614, n.
6. Of the origin, nature, and jurisdiction, of the court of prize. 613, n. to 620, n.
7. *Qu.* Whether questions on ransoms do not belong exclusively to the prize court. - 649, n. 650, n.
8. *Vide* PRIZE, No. 3, 4, 5, 6, 7.

ADMISSIBILITY of Evidence.

Vide CORPORATION, No. 6. EVIDENCE.

ADMISSION of Corporators.

Vide STAMPS, No. 1.

† ADMISSION of Parties

- † Instances where such admission is not sufficient evidence. *Vide* Acknowledgment, No. 1, 2.

AFFIDAVIT.

1. Two or more defendants in different actions cannot be held to bail on one affidavit; *Gilby v. Lockyer*, T. 19 G. 3. - Page 217, 218.
2. *Qu.* If such affidavit is not good against the first person mentioned in it. - 217
- † 3. The same defendant cannot be held to bail in an action of debt, and an action of *assumpsit* on one affidavit. 218, n. [† 64].
- † 4. And if he has been so held to bail (No. 3.) he will be discharged on common bail in both actions. 218, n. [† 64].
5. A defect in an original affidavit to hold to bail cannot be cured by a supplemental one. 467, and n. [† 106].
6. But, by the present practice of C. B. it should seem that it may; *Hobson v. Campbell*, C. B. T. 29 G. 3. - 467, n. [† 106]
7. It is not sufficient, in an affidavit to hold to bail, for the plaintiff to swear, that the defendant is indebted to him, in so much, upon promises; *Cope v. Cooke*, M. 21 G. 3. 467, 468
8. Nor in so much in trover; *Hubbard v. Pucheco*; C. B. E. 29 G. 3. 467, n. [† 106*]
9. *Vide* BAIL, No. 3, 6, 7. BANKRUPT, No. 22.

“AFORESAID.”

The word “*aforesaid*” implies and binds the party to an exact recital.

97

“AFTER.”

If a statute limits a proceeding against a party to six months, a year, &c. after an act done, the day on which the act was done is to be reckoned in

A Table of the Principal Matters.

in the six months, year, &c.; *Rex v. Adderley*, M. 21 G. 3. Page 463 to 465

AGENT.

1. An agent's bill to an attorney in the country may be taxed by the Master; *Dixon v. Plans*, M. 19 G. 3. 199, n. [1], 200, n.; *Ex parte Bearcroft*, C. B. E. 7 G. 3. - 200, n.
2. Payment to the agent for the attorney of a party, is not payment to the party; *Tates v. Freckleton*, H. 21 G. 3. - 623, 624
3. But if the agent in town take money out of court which the defendant has paid in under a judge's order, but irregularly, that shall bind the plaintiff, and be a waiver of the irregularity; *Griffiths v. Williams*, B. R. E. 27 G. 3. 624, n. [1]
4. *Vide* SHERIFF, No. 3. † UNDER Sheriff, No. 2.

AGREEMENT.

1. An agreement to accept a bill of exchange may amount to an acceptance. 299
2. Several owners of different ships having entered into a bond to a trustee, binding themselves and their assigns, to indemnify each other, to a certain amount, if any of their ships should be lost, and one of them having sold his ship, and she being afterwards lost, the others are not liable under the bond, unless the vendor has sold, together with the ship, his interest in the agreement of indemnity; *Ayres v. Wilson*, E. 20 G. 3. - 385, 386
3. But, if the vendor had agreed with the vendee to pay him so much if the ship should be lost within a given time, and the ship had been lost within that time, it should seem that the vendor might sue the others. 386, n. [17]
4. Government having contracted to furnish forage for a certain number of horses to be kept by a sutler, and the contractor for forage having

agreed not to commute the forage for money, an agreement between the sutler and contractor for forage, that the latter shall allow the former a sum of money for each ration of forage allowed for the whole number of horses, and shall retain the forage, is void; *Willis v. Baldwin*, M. 21 G. 3. - Page 450, 451

5. An officer or sailor who has agreed to serve on board a letter of marque, for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages, if the ship is taken before she complete her voyage, although he shall have been sent from the ship, before the capture, as prize-master on board a prize taken by her in the course of the voyage; *Abernethy v. Landale*, M. 21 G. 3. - 539 to 542
6. In an action on an agreement to deliver possession of certain premises, subject to the forfeiture of a stipulated sum on failure by either party, the person who was to deliver possession cannot support an action for the forfeiture, although he aver that he was ready and willing to deliver the possession, &c. without shewing in his declaration a possessory title in himself; *Luxton v. Robinson*, H. 21 G. 3. - 620, 621
7. An agreement to pay a sum of money to the assignees of a bankrupt when his certificate shall be allowed, whereby a creditor is induced to sign, (although the money to be paid is for the benefit of all the creditors,) is void under 5 Geo. 2. c. 30. § 11; *Jones v. Barkley*, B. R. M. 22 G. 3. 695, n. to 698, n.
8. *Vide* ANNUITY, No. 3. ASSIGNEE, No. 8. ASSUMPSIT, No. 10. BILL of Exchange, No. 8. BOND, No. 1, 2. COVENANT, No. 2, 20, 21. DEMAND, No. 3. EQUITY, No. 2. OPTION, USURY, No. 1, 4.

ALDERMAN.

1. *Qu.* Whether non-residence is a forfeiture of the office of alderman.

157

2. An

A Table of the Principal Matters.

1. An alderman of *London* is not compellable to serve the office of *constable*.
Page 538

ALIEN Enemy.

1. It has been held to be no defence in an *action* on a *ransom* bill, (at least on the plea of *non assumpsit*;) that the plaintiff is an alien enemy; *Cornu v. Blackburne*, E. 21 G. 3. 641 to 649
- † 2. But that point (No. 1.) was afterwards determined otherwise; *Fisher v. Anthon*, Cam. Scacc. M. 25 G. 3. 650, n. [† 132]
- † 3. An alien enemy cannot by the municipal law of this country sue for the recovery of a right claimed to be acquired by him in *actual war*; *Fisher v. Anthon*, Cam. Scacc. 650, n. [† 132]

ALLEGATION.

1. Allegations of facts *impertinent* to the cause are *surplusage*, and need not be proved. - 667
2. Such allegations will be struck out, upon motion, and *costs* allowed. 667
3. Allegations of facts *immaterial* but relative to the title of the party, though not necessary, yet, when introduced, must be proved, otherwise the plaintiff will be *non-suited*; *Brislow v. Wright*, E. 21 G. 3. 665 to 669, 668, n.
- ✧ 4. But that rule holds only in cases of *records*, and written contracts. 669, n. [† 138 ✧]

ALTERNATIVE.

- Of *limitations* which can only take effect in the alternative. 504, n. 505, n.

AMENDMENT.

1. The name of the *attorney* in the plaintiff's *warrant* may be altered so as to make it correspond with that in his *declaration*, after *error* brought and the *variance* between the *warrant* and *declaration* assigned for *error*; *Richards v. Brown*, E. 19 G. 3. - 114, 115, & n. [1]

2. So, a mistake in the addition in the *warrant* of *attorney* may be amended after *error* brought. Page 115
3. So, the *surname* of the *attorney* in the *declaration* may be amended and made to correspond with that in the *warrant* after *error* brought. 115, & n. [1]
4. A *judgment* may be amended by changing it from "*de bonis propriis*" to "*de bonis testatoris, &c.*" after *error* brought. 115, n. [1]. 116, n.
5. So, if the judgment do not say that the damages *occasione detentionis debiti* were awarded *ex assensu suo*, it may be amended though that has been assigned for *error*. - 116, n.
6. Amendments of omissions in matters of form may be made after *error* brought. - 115
- ✧ 7. And even after the *record* has been sent back from the *Exchequer Chamber*; *Green v. Bennett*, B. R. E. 27 G. 3. - 115, n. [✧]
- ✧ 8. There is no difference between civil and *penal actions* as to amendments at common law; *Goff (qui tam, &c.) v. Popplewell*, B. R. M. 29 G. 3. - 114, n. [✧]
- ✧ 9. But the court will not permit the sums and dates in the *declaration* to be amended in such *actions* (No. 8.), as in *actions* for *usury*, after the time limited for trying the *action* is expired. - 114, n. [✧]
10. A clerical mistake in a *return* to a *mandamus* may be amended after the *return* has been filed; *Rex v. Lyme Regis*, E. 19 G. 3. - 135 to 137
11. When there has been a general *verdict* and entire *damages* on several *counts*, some of which are bad, and *evidence* was only given that applied to the good *counts*, the *verdict* may be amended by the Judge's notes, and entered for the plaintiff only on the good *counts*; *Eddowes v. Hopkins*, E. 20 G. 3. 376 to 378. 730, 731. *Taylor v. White*, T. 21 G. 3. 746

AMOTION.

Vide CORPORATION, No. 1, 2, 3, 4, 5, 6.

ANCIENT

A Table of the Principal Matters.

ANCIENT Demise.

Vide TENANT.

ANCIENT Mill.

Vide DECLARATION, No. 1.

ANNUITY.

1. If an annuity is secured by a bond and also by a deed of covenant, though the bond has been forfeited prior to the discharge of the grantor under an insolvent act, he shall be liable to an action on the covenant, for payments accruing after the discharge; *Cotterel v. Hooke*, H. 19 G. 3. Page 97 to 101
2. But grantors of annuities discharged under the insolvent act of 18 Geo. 3. c. 52. are protected from future payments by § 30. of that act 100
3. By an express agreement, the obligee of an annuity bond may waive a forfeiture for non-payment on the day, so as to be entitled to recover future payments, although the obligor has been discharged under an insolvent act, between the time of the forfeiture, and the action brought; *Webster v. Bannister*, E. 20 G. 3. 393 to 397
4. If an annuity bond has been forfeited before a bankruptcy, the annuity may be valued, and the value proved under the commission. 523
5. If an annuity bond has been forfeited by slipping the day of payment, the debt is completely extinguished by a bankruptcy and certificate subsequent to the forfeiture, although the arrears shall have been paid previous to the bankruptcy; *Willie v. Wilkes*, M. 21 G. 3. 519 to 524
6. *Qu.* Whether a bond for securing an annuity is within 4 & 5 Ann. c. 16. § 12. giving the plea of *solvit post diem*. 520 to 524
7. *Vide* POWER, No. 2.

APPARITOR.

1. An apparitor cannot sue in the spi-

ritual court for his fees; *Painson v. Campion*, E. 21 G. 3. Page 629

2. *Vide* PROHIBITION, No 3.

APPEAL.

1. The justices are bound to receive an appeal from an order of removal, if tendered at the next quarter sessions, although no notice of an appeal has been given; *Rex v. the Justices of Gloucestershire*, E. 13 G. 3. 191
2. If the parish to which a pauper has been removed is at such a distance that there is not time to lodge an appeal at the quarter sessions immediately subsequent to the removal, the justices are bound to receive it at the sessions next ensuing, such being the true construction of 13 & 14 Car. 2. c. 12.; *Rex v. the Justices of the East Riding of Yorkshire*, E. 19 G. 3. 192
3. No appeal lies from an order of justices for the relief of a pauper; *Rex v. North Shields*, H. 20 G. 3. 331 to 333
4. An appeal lies from the Inns of court, in matters relative to calls to the bar, to the 12 Judges at Serjeant's Inn; *Rex v. Gray's Inn*, E. 20 G. 3. 353 to 357, & 357, n. [5]
5. A judge of appeal from the Admiralty jurisdictions in the Plantations may certify probable cause of seizure. *Vide* ADMIRALTY, No. 2.
6. Appeals to the commissioners of appeals from judgments by the commissioners of excise, and to the quarter sessions from judgments by justices, in causes and prosecutions for forfeitures and offences against the excise laws, are saved by 1 Geo. 2. c. 16. § 3. 551, 552

APPORTIONMENT.

1. Apportionment of premium. *Vide* INSURANCE, No. 42, 43, 44, 45, 46, 47.
2. Of the produce of prizes taken by two or more privateers. *Vide* PRIVATEER.

AP.

A Table of the Principal Matters.

APPRENTICE, APPRENTICESHIP.

1. An apprentice is not *assignable*, nor transmissible to *personal representatives*. Page 70; 71
2. *Settlement* by apprenticeship. *Vide* SETTLEMENT, No. 3, 4.
3. *Vide* COVENANT, No. 11.

ARBITRARY *Fine*.

Vide FINE on admission, &c.

ARREST.

Vide ACTION, No. 5, 8. PEACE-Officer. PRACTICE, No. 8. † BAIL.

ARTILLERY.

Horses employed in drawing the artillery are billetable under the *mutiny act*, whether they belong to the ordnance or are furnished for the service by *contract*; *Read v. Willan*, T. 20 G. 3. 422 to 426

ASPORTAVIT.

Vide COSTS, No. 19.

ASSIGNEE, ASSIGNOR, ASSIGNMENT.

1. An assignee of a *bankrupt*, a *devisee*, and a *personal representative*, are assignees in law to the purpose of being liable to actions on a *covenant* for rent in a *lease* to the bankrupt's *devisor* or *intestate*. 184
2. *Qu.* If the transfer to them is an assignment which will occasion a *forfeiture* under a proviso not to assign. 184; *Denn v. Steggs*; B. R. T. 21 G. 3. 184, n. [20]
3. A *lease* may be assigned to a *seme covert*, and is good unless the *husband* disagree; *Barnfather v. Jordan*, M. 21 G. 3. 452
4. If a term is assigned by way of *mortgage*, with a clause of *redemption*. *Vot. H.*

tion, the lessor cannot *declare* against the *mortgagee* in *covenant* as assignee of all the estate, right, title, interest, &c. of the *mortgagor*, even after the mortgage has been *forfeited*, unless the mortgagee has taken *actual possession*; *Eaton v. Jacques*, M. 21 G. 3. Page 455 to 461

5. But, under an *absolute* assignment of a term, the assignee may be sued on the *covenants*, before he has taken *actual possession*; *Walker v. Reeves*, B. R. M. 22 G. 3. 461, p. [1], to 463, n.
6. An assignee takes the thing assigned subject to all the *equity* to which the original party was subject. 636
7. Difference between an *underlease* and an assignment. *Vide* LEASE, No. 5, 8, 10.
8. The assignee of a term *declared against as such*, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and *agreed*, thereby, that the term, which was determinable at his *option*, should be absolute; *Chancellor v. Poole*, T. 21 G. 3. 764 to 767

† ASSIZE.

† The authority of the *judges* at *Nisi Prius* is by the commission of assize. 799

ASSUMPSIT.

1. *Indebitatus assumpsit* will lie on the judgment of a foreign court without declaring upon or proving the grounds and cause of action on which the judgment went; *Crawford v. Whittall*, B. R. H. 13 G. 3. 4, n. [1], 5, n. *Plaisford v. Van Uxem*, Cam. Seacc. T. 18 G. 3. 5, n.
 2. *Assumpsit* is a proper form of action although there has been an *express warranty*; *Stuart v. Wilkins*, M. 19 G. 3. 18 to 21
 3. And although the *warranty* is of something past or then existing. 18 to 21
- B b 4. *Assumpsit*

A Table of the Principal Matters.

4. *Assumpsit* for money had and received will not lie when the money has been paid on a *contract* which the other party contends to be still open; *Weston v. Downes*, M. 19 G. 3.

Page 23, 24, & n.

5. *Indebitatus assumpsit* lies upon an order to pay money made under the authority of an act of parliament; *Rann v. Green*, B. R. 17 G. 3. 10, n. 402, 403, & n. (m), *Brown v. Bullen*, E. 23 G. 3. 407 to 410

6. *Assumpsit* for money had and received will lie, if A. having obtained possession of goods entrusted to B. by C. to be sold at a fixed price, refuses either to return them to B. or to pay the fixed price, and B. being threatened with an action by C. pays him the price, for A. shall be presumed to have sold the goods; *Longchamp v. Kenny*, E. 19 G. 3. 137 to 139

7. But, in such a case (No. 6.) the plaintiff must have given the defendant notice of the nature of his demand, because a party shall not be permitted to avail himself of the generality of a declaration for money had and received, to surprize the defendant. - 138

8. *Qu.* If *assumpsit* for money laid out and expended would lie in the above case (No. 6.) - 138, 139

9. *Assumpsit* will lie against the assignees of a bankrupt for a creditor's share under an order of the commissioners for a dividend; *Brown v. Bullen*, E. 20 G. 3. 407 to 410

10. If the declaration contain a count on a special agreement, and also general counts, though the plaintiff fail in proving the special agreement, he may go into evidence on the general counts; *Payne v. Bacomb*, E. 20 G. 3. - 651

11. *Assumpsit* will lie for a fine assessed on admission to a copyhold estate. 728 & n. [3]

12. In such action (No. 11) you must prove that the sum laid to have been assessed, does not exceed two years value of the estate, (*vide FINE on admission*, &c. No. 1.) because you cannot recover a less sum than that

laid in the declaration. Page 731 n. [4], 732, n.

13. *Qu.* Whether, in such action (No. 11.) you may declare that two years value was assessed as a reasonable fine, without specifying a particular sum. : 731, n. 732, n.

- † 14. The declaration in such action, (No. 11.) may state generally, that the defendant was indebted to the plaintiff in such a sum, (*viz.* the amount of all the fines due,) for reasonable fines due and payable to him; *Whitehead v. Hunt*, B. R. H. 24 G. 3. - 727, n. [† 155]

- † 15. So, a general *indebitatus assumpsit* will lie for tolls. 728, n. [† 155]

16. In *assumpsit* on a policy of insurance, as for a total loss, an average loss may be recovered. 732, n. & n. (k)

17. *Vide BILL of Exchange*, No. 20. CONSIDERATION. RANSOM, No.

1. TITLE, No. 4.

ASSURANCE, ASSURED, ASSURER.

Vide INSURANCE.

† "A T."

- † 1. Under the words, "At and from Jamaica," in a policy of insurance the ship is protected, (till her departure on her voyage,) in going all round the island. - 370, n.

- † 2. *Qu.* If "all my estate at such a place," are words, in a will, descriptive of local situation only, or of a fee-simple interest. - 434

- † 3. *Qu.* If there is any difference in that respect between the words "at" and "in." - 434

ATTACHMENT.

1. Attachment of money in the Plantations, *Vide BANKRUPT*, No. 19.

2. The custom of foreign attachment in the city of London has been certified by the Recorder. 379, 380

- † 3. And therefore the court must take notice of it. - 384

4. The form of proceeding on a foreign attachment. - 303

5. In what cases the proceeding against a sheriff after he has gone out of office

A Table of the Principal Matters:

office shall be by *attachment*, and when by *distingas*. Page 464

6. *Vide PRACTICE*, No. 9. SHERIFF, No. 4, 5. WITNESS, No. 3.

ATTORNEY.

1. If an attorney has been struck off the *roll*, (though at his own request,) and called to the *bar*, the court would not permit him to be put on the *roll* again; at least not unless he has been *disbarred* upon application for that purpose to the *Inn of Court* where he was called; *Ex parte Cole*, E. 19 G. 3. 114

2. The court will lay an attorney who has been struck off the *roll* at his own instance, and applies to be restored, under the terms of taking no advantage of his privilege in any action then depending. - 114, n. [† 49]

3. A warrant of attorney may be entered at any time, *pendente lite*. 115

4. If an attorney's bill has been delivered a month and not referred for taxation, the defendant, (in an action brought upon it, shall not be permitted to question the reasonableness of the items at *Nisi Prius*, nor before the sheriff; *Williams v. Frith*, T. 19 G. 3. 198. *Hooper v. Till*, T. 19 G. 3. 198, 199

5. It is not necessary that an attorney's bill should have been delivered a month, to entitle him to set it off in an action brought against him, it being sufficient for that purpose, if it has been delivered long enough to have been taxed. 199, n. [† 63]

6. If part of an attorney's bill is for business done in court, and the rest for conveyancing or parliamentary business, the Master has power to tax the whole. - 199, n. [1]

But not if the whole is for conveyancing, &c. - 129, n. [1]

7. A party cannot change his attorney without the leave of the court; *Macpherson v. Rorison* T. 19 G. 3. 217

8. An attorney has a lien on his client's deeds, papers, or money, for his bill. 104, 105, 238

10. And may obtain an order to stop his client from receiving money recovered in a suit in which he was employed for him, till his bill is paid. - Page 238

11. *Qu.* If he give notice to the other party not to pay the money over to his client, because he has no other security for his bill, whether he can recover against such other party, if he pay the money over after the notice. 238, 239

12. Unless such notice is given, the parties may compromise the debt and costs, and the plaintiff release the defendant, without the intervention of the plaintiff's attorney, who in such case will have no remedy for his bill against the defendant; *Wells v. Hole*, M. 20 G. 3. 238, 239

13. An attorney cannot be sued by original; *Comerford v. Price*, H. 20 G. 3. 312 to 314

† 14. But if he is, he is not entitled to be discharged on serving the sheriff with a writ of privilege, but must plead his privilege in abatement. 314, n. [† 85]

15. The jurisdiction of the county court of *Middlesex*, does not extend to attorneys; *Wilsbire v. Lloyd*, E. 20 G. 3. 381, 382

† 16. And a defendant who resides within the jurisdiction of that court, is not entitled to the benefit of the statute of 23 G. 2. c. 33. if the plaintiff is an attorney; *Huffey v. Jordan*, B. R. T. 25 G. 3. 382, n. [† 97]

17. But the jurisdiction of the court of conscience for *Westminster* does extend to attorneys. - 381

18. An attorney cannot be bail. 466, n. [1]

19. Nor the clerk to the defendant's attorney; *Boulogne v. Vautrin*, B. R. T. 18 G. 3. 467, n.

20. But, in a criminal case, the attorney for the defendant may be his bail; *Rex v. Bowes*, 467, n. [O]

21. An attorney cannot be lessee in an *ejectment*. 466, n. [1], 467, n.

22. And is not compellable to serve as constable. - 538

B b 2

23. Payment

A Table of the Principal Matters.

23. Payment to the attorney is payment to the principal. *Page 624*
 24. *Vide* AGENT. AMENDMENT, No. 1, 2, 3.

ATTORNEY General.

Vide INFORMATION *ex officio*.

ATTORNMENT.

1. Attornment is not necessary in any case since the statute of 4 Ann. c. 16. § 9. - 282, 283
 2. *Vide* PLEADING, No. 8, 9.

AVERAGE *Loss*.

Vide INSURANCE, No. 10, 12, 20, 52, 53.

AVERMENT.

1. Averment of facts. *Vide* ALLEGATION.
 2. The conclusion of a plea by averment of verification. *Vide* VERIFICATION.

AVOWANT.

Vide COSTS, No. 14, 15.

AVOWRY.

Vide PLEADING, No. 9.

B.

BAIL.

1. THE bail will be discharged, upon motion, if the defendant become a peer pending the action; *Trinder v. Shirley*, M. 19 G. 3. 45
 2. If notice of justification has been given by a new attorney, not allowed by the court, the bail will not be permitted to justify; *Macpherson v. Rorison*, T. 19 G. 3. 217

3. Bail to the action are not liable beyond the sum sworn to, and the costs, whatever the amount of the damages recovered may be; *Jackson v. Haffell*, H. 20 G. 3. *Page 330*
 4. But bail to the sheriff are liable to the extent of the penalty in the bail-bond, to satisfy the full debt and costs, although by 12 Geo. 1. c. 29, the bond cannot be taken in a penalty of more than double the sum sworn to; *Mitchell v. Gibbons*, C. B. M. 29 G. 3. 330, n. [15]
 5. To the sheriff on an attachment for not bringing in the body, is liable to the whole debt and costs; *Fowles v. Mackintosh*, C. B. E. 29 G. 3. 330, n. [15]
 6. In debt on a bond conditioned for an indemnification, &c. the defendant ought not to be held to bail for the penalty, but only for the amount of the damages incurred; *Kirk v. Strickland*, M. 21 Geo. 3. 449, 450
 7. The court will never go into the merits on a motion to discharge a party on filing common bail, but will take the fact as sworn to in the affidavit to hold to bail. 45
 8. The keeper of a prison cannot be bail; *Hawkins v. Magnall*, M. 21 G. 3. 46
 9. Nor an attorney. 466, 467
 10. Nor the clerk to the defendant's attorney; *Boulogne v. Vautrin*, B. T. 18 G. 3. 467
 11. But, in a criminal case, the defendant's attorney may be his bail; *Rex v. Bowes*. 467, n. [15]
 12. But if a person disqualified from being bail (No. 6, 7, 8.) is put in, and not excepted to, the plaintiff cannot proceed on the bail-bond as if bail had been put in; *Thompson v. Roubell*, B. R. E. 22 G. 3. 467
 13. The proper form of a replication to a *scire facias* against bail. *VERIFICATION*, No. 1:
 14. *Vide* AFFIDAVIT.

BAIL in Error.

Vide INTEREST of Money, No.

BAILIFF

A Table of the Principal Matters.

BAILIFF.

Vide SHERIFF.

BANKER.

Vide USURY, No. 9.

BANKRUPT.

1. Though a prior *commission* has been superseded by consent, a *certificate* under a second bankruptcy does not protect future effects, unless the bankrupt pay 15 s. in the pound under the second commission; *Thorn-ton v. Dallas*, M. 19 G. 3. Page 46 to 49
- † 2. If a trader draw a *bill of exchange* which is afterwards protested for non-acceptance, and become a bank-rupt before the return of the bill, the *debt* is discharged by the bank-ruptcy (and certificate). 55, n. [28]
3. An *assignment*, by deed, of a lease, part of a bankrupt's estate, in con-templation of a bankruptcy, is itself an *act of bankruptcy*; *Devon v. Watts*, H. 19 G. 3. - 86 to 89
4. So is an assignment of *all* a trader's stock, though only by way of secu-rity, and for *valuable consideration*. 87
5. So, though such assignment (No. 4.) is only of *one third* of his stock. 87
6. A parole assignment of only *part* of a trader's stock, and though by way of *security*, if done in contemplation of a bankruptcy, is *void*. 87
- † 7. If a trader, owner of a copyhold house worth 400 l. and personal es-tate worth upwards of 800 l. having borrowed 200 l. on a joint bond of himself and A.—execute a deed pur-porting to be intended as an indem-nity to A. and thereby, 1. covenant to surrender the house three months after the date thereof, to the use of A. and his executors for 500 years; and, 2. bargain and sell to A. all his household furniture and effects enu-merated in a schedule, and all other his personal estate, the said deed to be

void if the 200 l. and interest should be paid when due by the bond, *viz.* six months afterwards, and formal possession of the personal estate is given by the delivery of a silver spoon in the name of the whole,—this is an *act of bankruptcy* under 1 Jac. 1. c. 15. § 2.; although such trader should be in full credit at the time and so continue for three years afterwards, and although it do not appear whether he was or was not then indebted in any further sum than the 200 l. and 100 l. to the pe-titioning creditor; *Hassells v. Simp-son*, B. R. H. 24 G. 3. Page 89, n. [† 39] to 93, [†]

- † 8. A trader may be *insolvent* without being a bankrupt. 92, n. [†]
- † 9. And a trader may be a bankrupt though *solvent*. - 92, n. [†]
10. A demand against a bankrupt can-not be *set off* in an action by his assignees, for *trover* and conversion, subsequent to the bankruptcy, of effects belonging to the bankrupt estate; *Wilkins v. Carmichael*, H. 19 G. 3. - 101 to 105
- † 11. A demand in *trover*, if for a li-quidated amount, may be *proved* under a *commission* of bankruptcy. 168, n. [†]
12. On a general *plea* of bankruptcy under 5 Geo. 2. c. 30. to an action on a *bond*, the plaintiff may give in *evid-ence* the *condition*, (without having set it out on the record,) to shew that the action is not barred by the *certificate*; *Alfop v. Price*, E. 19 G. 3. - 160 to 165
13. Where a *bond* conditioned for the repayment of a sum of money, by a *principal* and *surety*, has not been *forfeited* till after the bankruptcy of the surety, the *debt* cannot be proved under his *commission*, and therefore he may be sued upon it notwithstand-ing his *certificate*, the debt as to him being contingent, and not within 7 Geo. 1. c. 31.; *Alfop v. Price*, E. 19 G. 3. - 160 to 165
- † 14. And if A. at the instance of a trader, *accepts* a bill payable to his order, not having any effects of the trader in his hands, and the trader

B b 3

becomes

A Table of the Principal Matters.

becomes a bankrupt before the bill becomes due, and *A.* pays it when due to an *indorsee*, it is not a debt against the trader till actually paid, and therefore is not discharged by his *certificate*; *Heskuyson v. Woodbridge*, *B. R. M.* 24 *G.* 3.

Page 166, n. [† 55]

15. So, if a *principal* and *surety* join in a *bond* for the payment of money by instalments, and the *principal* give the other, by way of counter-security, a *bond* conditioned for the payment of the amount of the instalments, on a day previous to that on which the first instalment is to be payable, and the *principal* becomes a bankrupt on a day subsequent to that in the condition of his *bond* to the *surety*, though previous to that on which the first instalment is payable, and after the bankruptcy the *surety* pays the instalments, he may *prove* the debt under the *commission*, and cannot sue the *principal* after he obtains his *certificate*; *Toussaint v. Martinnant*, *B. R. M.* 28 *G.* 3. 168, n. [† 55]

16. And the same rule holds where a counter-bond is given, though the *principal* become a bankrupt previous to the day of payment in such counter-bond, and before the *surety* has been called upon to pay the original debt; *Martin v. Court*, *B. R. T.* 28 *G.* 3. 168, n. [† 55]

17. If a *trader* underwrite a *policy* of *insurance* on a *life*, and afterwards, and before the loss by the death of the party, become a bankrupt the demand is discharged by his *certificate*, under 19 *G.* 2. c. 32. § 2; *Cox v. Liotard*, *B. R. H.* 24 *G.* 3. 166, n. [† 55], 166, n. [† 55]

18. If *A.* give his *promissory note* to a *trader*, and also an ordinance debenture as a collateral security, and the *trader* pledge the debenture, and the note, being *indorsed* by him, is paid by *A.* when due, and afterwards the *trader* becomes a bankrupt, and then *A.* redeems the debenture and brings an action against the bankrupt for what he pays for such redemption, the bankrupt's *cer-*

tificate may be *pleaded* in bar to the action; *Johnson v. Spiller*, *B. R. H.* 24 *G.* 3. Page 167, n. [†], 168, [†]

19. *Bonds* payable at a future day, and within 7 *Geo.* 1. c. 31. though not given for goods sold by a *trader* 165, n. [9]

20. *Debts*, which at the time of the bankruptcy may never become due (and which are not within 19 *Geo.* 2. c. 32.) cannot be proved under the *commission*, and therefore are not discharged by the *certificate*. 165, n. [9]

21. Money owing out of *England*, (as in the *Plantations*,) to a bankrupt may be *attached* by the law of the place, after the bankruptcy, for a debt due before it; *Le Chevalier v. Lynch*, *E.* 19 *G.* 3. 170, 171

22. *Qu.* If a bankrupt after his *certificate* pay interest on a *bond* conditioned for the repayment of money granted before the bankruptcy, whether this will amount to a new *contract* for the principal in the *bond* so as to make him liable. 191

23. When the petitioning *creditor's* debt is by *bond*, it is not sufficient in an action by the assignees for them to prove an *acknowledgment* of the debt by the bankrupt, but they must produce the *subscribing witness* to prove the execution of the *bond*; *Abbot v. Plumbe*, *T.* 19 *G.* 3. 216

24. If some of the bankrupt's *creditors* are induced, by money, to sign the *certificate*, though the bankrupt does not know of it at the time of their signing, nor even when he makes the necessary *affidavit* in order to obtain the allowance by the *Chancery*, yet, if he knows it before the actual allowance, the *certificate* is void; *Robson v. Calze*, *T.* 19 *G.* 3. 228 to 231

25. If money is given without the bankrupt's privity, to induce *creditors* to sign, in order to deprive him of the effect of his *certificate*, and sufficient in number and value have signed, exclusive of those who have taken money, the *certificate* shall be valid. 231

26. *Be*

A Table of the Principal Matters.

26. But if, in such case (No. 23.) the necessary number and value is not complete exclusive of those who have taken money, it is *void*. Page 230
27. The *depositions* of the *act of bankruptcy*, when recorded according to 5 Geo. 2. c. 30. § 41. (or copies thereof,) are *evidence* in an action at law, to prove the *precise time* of the *act of bankruptcy*, if such time is specified in them; *Janson v. Willson*, M. 20 Geo. 3. 257 to 260
28. An inaccuracy in 5 Geo. 2. c. 30. relative to the method of attesting the record of proceedings before *commissioners of bankrupt*. 258, n. [1]
29. A *debt* contracted before the party entered into trade may be the ground of a petition for a *commission of bankruptcy*; *Butcher v. Easto*, M. 20 G. 3. 295, & n. (b)
30. If a trader execute a *bill of sale* of all his stock and effects to pay certain *creditors*, the overplus, if any, to be accounted for to himself, this is an *act of bankruptcy*; *Butcher v. Easto*, M. 20 G. 3. 295 to 297
31. If a bankrupt, after he has obtained his *certificate*, and who trades again for himself, is left for several years in possession of his house, household goods and furniture, in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the goods, &c. in their accounts with the *creditors*, as part of the estate, such possession does not fall within 21 Jac. 1. c. 19. § 11. so as to vest the goods in *assignees* under a new *commission*; *Walker v. Burnell*, H. 20 G. 3. 317 to 320
32. *Assumpsit* will lie for a *creditor's* share under an order for a *dividend*; *Brown v. Bullen*, E. 20 G. 3. 407 to 410
33. And in such action (No. 30.) the proceedings under the *commission* are *conclusive evidence* of the debt; *Brown v. Bullen*, E. 20 G. 3. 407 to 410
34. And the assignees cannot, in such action (No. 30) *set off* a debt due to the bankrupt estate by the plaintiff; *Brown v. Bullen*, E. 20 G. 3. Page 407 to 410
35. If a *creditor* has taken money for signing a bankrupt's *certificate*, it shall be recovered back in an *action for money had and received*, because of the oppression, and that there is not *par delictum*; 472. *Smith v. Bromley*, N. Pr. cor. Ld. Mansfield, E. 1 G. 3. 696 to 698, n. & n. (b)
36. An *agreement* to pay money to the assignees of a bankrupt on his *certificate* being allowed, though for the benefit of all the *creditors*, is *void* under 5 Geo. 2. c. 30. § 11.; *Jones v. Barkley*, B. R. M. 22 G. 3. 695 n. [3], to 698, n.
37. Bankruptcy is no *plea* in bar to an action of *trespass* for *mesne profits*, because the damages are uncertain; *Goodtitle v. North*, H. 21 G. 3. 584, 585
38. But where a demand, though sounding in *damages*, is such as can be liquidated and ascertained, without the intervention of a *jury*, it is a debt that may be *proved*; *Utterston v. Vernon*, B. R. H. 30 G. 3. 584, n. [1.]
39. *Vide* EXCISE, No. 1. EXTENT, No. 1. LEASE, No. 15. SCOTLAND.

B A R.

Trial at bar. *Vide* TREASON, No. 3. TRIAL, No. 6, 7.

BARBADOES.

Vide JAMAICA, No. 2.

BARGAIN and Sale.

Vide EVIDENCE, No. 5.

B A R O N.

Vide HUSBAND.

BARRISTER.

1. A barrister cannot be admitted an attorney; *Ex parte Cole*, E. 19 G. 3. 114

A Table of the Principal Matters.

2. A *mandamus* will not lie to compel the admission to the degree of barrister; *Rex v. Gray's Inn*, E. 20 G. 3. Page 353 to 357
3. The only remedy in case of an arbitrary refusal by the *Inn of Court* to which the party belongs, is by *appeal* to the 12 Judges; *Rex v. Gray's Inn*, E. 20 G. 3. 353 to 357

BASTARD.

1. A bastard living with its mother for nurture at the place of her settlement must be maintained by its own parish, and not by the mother's; *Simpson v. Johnson*, M. 19 G. 3. 7 to 9
2. When a bastard dies intestate the King takes his effects subject to his debts. 548
3. An original order of bastardy may be made at the *Quarter Sessions*; *Rex v. Greaves*, E. 21 G. 3. 632, 633, & n. [2]
4. An order of bastardy, stating, "whereas it hath appeared to us, &c." without an express adjudication, that the person charged is the putative father, is void; *Rex v. Pitts*, E. 21 G. 3. 662 to 664
5. An action will lie on a bastardy bond, at the suit of parish officers, who have advanced money for the bastard, if settled in their parish, though no order for that purpose has been made upon them; *Hays v. Bryant*, C. B. T. 29 G. 3. 6, n. [2]

B I L L.

- † 1. Where there is no *special memorandum*, the bill, by *fictio*, is held to be of the first day of the term, 62, n. [† 30]
- † 2. The bill, not the *latitat*, is, in general, considered as the commencement of the suit in B. R. 62, n. & [† 30]
- † 3. But where one of the *statutes of limitations* is pleaded, the plaintiff may reply a *latitat* sued out of the preceding term, and the defendant may rejoin, that the *latitat* was not, in fact, sued out till the vacation after

such preceding term, and after the expiration of the time limited for bringing the action. Page 62, n. [† 30]

- † 4. So, if the defendant plead a *tender* before the exhibiting of the bill, and the plaintiff reply a *latitat* previous to the tender, the defendant may rejoin that there was no cause of action when the *latitat* issued. 62, n. [† 30]

- † 5. So, if there is no *special memorandum*, and the cause of action arose after the first day of the term, a *latitat* sued out after the first day may be given in evidence to shew that the commencement of the suit was subsequent to the cause of action; *Pugh v. Martin*, B. R. H. 24 G. 3. 62, n. [† 30]

6. An attorney must be sued by bill; *Comerford v. Price*, H. 20 G. 3. 312 to 314

7. A bill against an attorney may be filed in vacation to save the statute of limitations; *Lane v. Wheat*, B. R. M. 23 G. 3. 313, n. [† 84], 314, n. [†]

† B I L L of Cost.

- † *Vide* ATTORNEY, No. 4, 5, 6, 7, 9, 10, 11, 12.

B I L L of Exchange.

1. If a bill of exchange is not accepted, an action will immediately lie against the drawer, before the time when it is made payable; *Misford v. Mayor*, H. 19 G. 3. 55
2. Nothing but an express declaration by the holder will discharge the acceptor; *Dingwall v. Dunstar*, M. 20 G. 3. 247 to 250
- † 3. Though the payer receives part of the money from the drawer when the bill becomes due, and takes an undertaking from him indorsed on the bill, by which the drawer promises to pay the remainder at a future time, that does not discharge the acceptor; *Ellis v. Gahnda*, B. R. M. 24 G. 3. 250, n. [† 71]
- † 4. Nor although the payer in such case

A Table of the Principal Matters.

- case (No. 3.) should suffer several years to elapse before he sue the acceptor; *Ellis v. Galindo*, B. R. M. 24 G. 3. Page 250, n. [† 71]
5. A bill of exchange given for money won at play is void even in the hands of an indorsee for valuable consideration without notice. 247, n. [1], 636, 741 to 744
6. An agreement to accept may amount to an acceptance. 299
7. Such agreement (No. 6.) may be so expressed as to put an indorsee in a better situation than the drawer. 299
8. An agreement to accept on certain conditions is discharged if the conditions are not complied with; *Mason v. Hunt*, M. 20 G. 3. 297 to 300
9. If there is a virtual acceptance in consideration that goods shall be consigned to the acceptor to answer the bill, together with a policy on them, the holder of the bill, by taking to the goods and selling them himself, discharges the acceptor; *Mason v. Hunt*, 20 G. 3. 297 to 300
- † 10. The parole acceptance of inland bills of exchange is good, (as well as of foreign,) notwithstanding 9 & 10 W. 3. c. 17. § 1. and 3 & 4 Ann. c. 9. § 5.; *Lumley v. Palmer*, B. R. M. 8 G. 2. 299, n. [† 71]
11. An attorney sued by original on a bill of exchange, and declared against as having accepted it according to the custom of merchants, may plead his privilege in abatement; *Cumford v. Price*, H. 20 G. 3. 312 to 314
12. A bill of exchange given upon an usurious contract is void in the hands of an indorsee, though for valuable consideration, and without notice of the usury; *Leve v. Waller*, T. 21 G. 3. 736 to 744
13. An indorsement written on a blank note or check in the form of a bill of exchange or promissory note, will bind the indorser for any sum and time of payment which the person to whom he entrusts the note so indorsed shall insert in it; *Russell v. Langstaffe*, M. 21 G. 3. 514 to 516 & n. [1]
14. And the holder may declare against such an indorser, as indorser of a bill of exchange or promissory note; *Russell v. Langstaffe*, M. 21 G. 3. Page 514 to 516
15. What shall be reasonable notice to the indorser of non-payment by the acceptor of a bill of exchange, or drawer of a promissory note, is for the decision of the jury. 515
16. A bill of exchange, with a blank indorsement, being stolen and negotiated, an innocent indorsee for valuable consideration shall recover upon it against the drawer; *Peacock v. Rhodes*, E. 21 G. 3. 633 to 636
17. So, the innocent holder of a forged bill of exchange for which he has given valuable consideration, shall recover against the acceptor who accepted it not knowing of the forgery. 635
18. A bill of exchange being drawn by A. on B. payable to C. or order, and indorsed by C. in these words, "the within must be credited to D. value in account," and D. being indebted to B. and the bill sent to B. and accepted by him, and he having given D. notice that he had received it and placed it to D.'s account, this is such a special indorsement as restrains the negotiability of the bill; *Anchor v. the Bank of England*, E. 21 G. 3. 637 to 641
19. And if afterwards a forged indorsement, purporting to be by D. to pay to E. or order, is written upon such bill, (No. 17.) and the bill discounted, the person discounting it shall stand to the loss; *Anchor v. the Bank of England*, E. 21 G. 3. 637 to 641
20. And if an agent of A. (B. having become insolvent,) pay the money for A. and take up such bill, (No. 17.) A. may recover back the money in an action for money had and received; *Anchor v. the Bank of England*, E. 21 G. 3. 637 to 641
- † 21. If a bill is drawn by two, payable to "us or our order," and subscribed by both, though not in partnership, they make themselves partners by the form of the bill, to the effect of making an indorsement by one of them

A Table of the Principal Matters.

- them valid; *Carvick v. Vickery*, B. R. H. 23 G. 3. Page 653, n. [† 134], 654, n. [†]
- † 22. But an universal *usage* and understanding of merchants and bankers may render such an indorsement (No. 20.) void; *Carvick v. Vickery*, N. Pr. after H. 23 G. 3. 654, n. [†]
23. In an action against an *indorser*, if the declaration do not alledge a demand on the *acceptor*, and refusal by him on the day when the bill became payable, it is *error*, and not cured by *verdict*; *Rushton v. Aspinall*, T. 21 G. 3. 679 to 684
24. So, if the declaration do not alledge notice to the defendant of such demand, and refusal (No. 22.) by the *acceptor*; *Rushton v. Aspinall*, T. 21 G. 3. 679 to 684

BILL of Middlesex.

Vide PRACTICE, No. 8.

BILL of Ransom.

Vide RANSOM.

† BILL of Rights.

† Vide TABLE of Statutes after Title STATUTE.

BILL of Sale.

Vide BANKRUPT, No. 30.

BLACK AB.

If the offender under this act (9 G. 1. c. 22.) is convicted within 6 months, the Hundred is not liable. 704

BOND.

1. A bond for performance of covenants or agreements is only a security (under 8 & 9 W. 3. c. 11.) to the extent of the penalty; *White v. Sealy*, M. 19 G. 3. 49, 50
2. But vide *Lord Lonsdale v.*

Church, B. R. E. 28 G. 3.

Page 50, n. [20], [K]

3. If the condition of a bond is that a servant shall not embezzle any money that shall come to his hands on account of his master, it is necessary for the obligee, in an action on the bond, to shew in his replication some particular sum or sums embezzled, and how or from whom received; *Jones v. Williams*, T. 19 G. 3. 214, 215
4. Evidence of the acknowledgment of the debt by the obligor is not sufficient to support an action on a bond conditioned for the payment of money, but the execution must be proved; *Abbot v. Plumb*, T. 19 G. 3. 216, 217
5. The condition of a bond being to render a fair, just, and perfect account in writing, of all sums received, if the obligor neglect to pay over such sums it is a breach of the condition; *Bache v. Proctor*, E. 20 G. 3. 382 to 384
6. Vide ANNUITY, No. 1, 2, 4, 5
6. BAIL, No. 4, 5. BANKRUPT, No. 12, 13, 14, 15, 16, 22, 23
- INSOLVENT Debtor, No. 6.

† BOYS.

- † 1. Where a certain number of "seamen besides passengers," is specified in a warranty in a policy of insurance, the warranty is complied with, if there is the specified number including boys; *Bean v. Stupart*, M. 19 G. 3. 11 to 14
- † 2. 2. *A fortiori*, this seems to hold (No. 1) in the case of a representation. 12, n

† BRIDGES.

- † 1 Construction of § 4. of the statute of bridges and highways. 189, 190
- † 2. Vide TABLE of Statutes after Title STATUTE.

BIBERY.

☞ Vide MIS-RECITAL, No. 4.

† CAPIAS

A Table of the Principal Matters.

C.

† CAPIAS.

- † 1. THE *plaint* not the *capias* is the commencement of the suit in the *Marshalsea court*; *Ward v. Honeywood*, H. 19 G. 3. Page 61, 62
- † 2. But the *capias* is now considered as the commencement of the suit in C. B. - 62, n. [† 31]
- † 3. And though the *declaration* state an original sued-out, the *capias* is sufficient evidence thereof. 62, n. [† 31]

CAPITAL Burgefs.

1. *Qy.* Whether non-residence is a forfeiture of the office of a capital burgefs. - 157

CAPTOR, CAPTURE.

Vide INSURANCE, No. 10, 12, 15, 41, 42, 43, 50. PRIZE.

C A S E.

1. *Action* on the case. *Vide* ACTION, No. 1, 2, 3, 4. ASSUMPSIT.
2. A case cannot be sent by the committee of appeals of the *privy council* for the opinion of a court of law. 344, n.
3. Nor by the *Master* of the *Rolls*. 344, n.*
- † 4. Though in the case of *Coulson v. Coulson*, that (No. 3.) seems to have been done. 344, n. [† 90]

† CAUSE of Action.

Vide BILL, No. 4, 5. LATITAT, PLEA pleaded, No. 3, 4.

CERTAINTY.

1. The different sorts of certainty. 158 to 159, 158, n. [† 53]
2. Certainty to a certain intent in general is all that is requisite in counts, *replikations* and *indictments*, and returns to

writs of *mandamus* and *habeas corpus*. - Page 159

3. Such certainty (No. 2.) means what, upon a fair and reasonable construction, may be called certain, without recurring to *possible* facts. 159
4. Certainty to a common intent is sufficient in *pleas* in bar. 158
5. Certainty to a certain intent in every particular is necessary in *stoppels*. 159

CERTIFICATE by a Judge.

1. The certificate of the Judge or court that there was *probable cause* for seizing a ship or goods as contraband, shall protect the person making the seizure and prosecuting for a condemnation, although the ship or goods should be acquitted. 107, 108
2. Or, when an action is brought for seizing a ship or goods, although there is a verdict for the plaintiff, if the Judge or court grant such certificate (No. 1.) the plaintiff shall not have more than nominal damages, besides his ship or goods, and shall not have costs. 107
3. Such certificate (No. 1.) may be granted after the trial or sentence; *Sullivan v. Montague*, H. 19 G. 3. 106 to 109
- † 4. And although no suit has been commenced in the *Exchequer* for the condemnation of the ship or goods; *Renalls v. Cooper*, B. R. E. 22 G. 3. 108, n. [† 45]
5. And by a court of appeal from the Admiralty jurisdiction in the *Plantations*; *Sullivan v. Montague*, H. 19 G. 3. 106 to 109
6. *Vide* COSTS, No. 2, 7, 8, 19.

CERTIFICATE of a Bankrupt.

Vide BANKRUPT, No. 1, 2, 12, 13, 14, 15, 16, 20, 24, 25, 26, 31, 35, 36, 37, 38.

CERTIFICATE of a Pauper.

1. Instance where it shall not operate 19

A Table of the Principal Matters.

to prevent the pauper's son from gaining a settlement in the certifying parish; *Rex v. Frampton*, T. 20 G. 3.

Page 418, 419

2. A residence on the pauper's own estate, whatever the value is, discharges a certificate.

770, & n. [1]

CERTIFICATE of a Custom.

1. If the Recorder of London has certified a custom as part of the customs of London, the court must take notice of it. 380
2. And it cannot be certified again. 380

CERTIORARI.

1. A *certiorari* will not lie to remove a conviction by commissioners of excise for the double duties on beer; *Rex v. Whitbread*, M. 21 G. 3.

549 to 553

- † 2. But a *certiorari* will lie to remove conviction under st. 11 G. 1. c. 30. § 16. for harbouring tea and spirits, either by justices of peace or commissioners of excise; *Rex v. Abbot*, B. R. H. 23 G. 3. 553, n. [† 113], to 555, n. [†]

- † 3. But such *certiorari* will not be granted on an objection to the conviction founded on the merits; *Rex v. Abbot*, B. R. H. 23 G. 3. 553, n. [† 113], to 555, n. [†]

4. A *certiorari* cannot be sued out as of course, and without laying a special ground before the court, to remove proceedings in an action in the courts of the counties palatine; *Zinck v. Langton*, T. 21 G. 3.

749 to 752

5. Nor to remove such proceedings (No. 4.) in the courts of Great Sessions, in Wales; *Williams v. Thomas*, B. R. E. 22 G. 3. 751, n. [2]

6. In all cases where a defendant applies for a *certiorari*, he must state a special ground by affidavit; *Rex v. Eaton*, M. 28 Geo. 3. 751, n. [2]

7. *Vide* CONVICTION, No. 3.

CESTUI que Trust.

Vide EQUITABLE Estate. EJECTMENT, No. 3.

CESTUI que Use.

Vide USE.

CHANCERY.

Vide EXCHEQUER Chamber, No. 2. PRACTICE, No. 10. LEASE, No. 2.

CHARTER.

1. A charter creating a new corporation must be accepted *in toto* if at all. Page 535, n. [1]
2. *Qu.* Whether a charter granted to an existing corporation may not be accepted in part. 535, & n. [1]
3. *Vide* CORPORATION, No. 1. COUNTY, No. 1.

CHARTER-Party.

1. Freighters of ships under the charter-parties of the East-India Company are not answerable for damage or loss to the cargo happening by the act of God; *Hotham v. the East-India Company*, M. 20 G. 3. 273 to 278
2. "Ship-damage" in those charter-parties means damage from negligence, insufficiency, or bad stowage in the ship, exclusive of what is occasioned by storm or other sea-hazard; *Hotham v. the East-India Company*, M. 20 G. 3. 273 to 278

CHILDREN.

1. Children, whether legitimate or bastard, living with their mother for nurture, but having a different settlement from her, are to be maintained by their own, not their mother's parish; *Simpson v. Johnson*, M. 19 G. 3. 7 to 9. *Rex v. Hemlington*, H. 17 G. 3. 9, n. [1], 10, n.
2. Operation of the word "children" in a will. *Vide* WILL, No. 19, 21.

CLERGY.

A Table of the Principal Matters.

CLERGYMAN.

1. A clergyman is not liable to serve on juries. *Page 190, & n. (m)*

1. *Vide* MARRIAGE, No. 4.

† COMMENCEMENT of Action.

† *Vide* BILL, No. 2, 3, 4, 5. CAPIAS, LATITAT. MARSHALSEA Court. PLEA pleaded, No. 3, 4.

COMMISSION.

1. What debts are proveable under a commission of *bankrupt*. *Vide* BANKRUPT, No. 2, 11, 15, 17.
2. What debts are not. *Vide* BANKRUPT, No. 13, 14, 16, 18.
3. *Vide* ASSIZE. Nisi Prius. *U* SURY, No. 9.

† COMMISSIONERS of Excise.

† 1. Their powers as to the *excise* laws within the bills of mortality, and those of justices of the peace in all other places are co-extensive.

Page 55, n. [†]

† 2. *Vide* CERTIORARI, No. 1, 2, 3.

† COMMON BAIL.

† *Vide* AFFIDAVIT, No. 4. BAIL, No. 7.

COMMON PLEAS.

Vide OYER, No. 2. TRIAL, No. 3.

† CAPIAS, No. 2, 3.

☞ COMMONS.

☞ *Vide* HOUSE OF COMMONS.

COMPETENCY.

Competency of evidence. *Vide* EVIDENCE.

CONCLUSION.

When the conclusion of a *plea* should be to the court, and when to the country. *Vide* PLEADING, No. 2, 13, 14. TRAVERSE. VERIFICATION.

CONCLUSIVE.

What evidence shall be conclusive and in what cases. *Vide* ADMIRALTY, No. 3. BANKRUPT, No. 33. *☞* FOREIGN Judgment, No. 2, 3.

CONCURRENT.

1. What *remainders* are said to be concurrent. *Page 265, 487, n. 488, n.*
2. The inaccuracy of that expression. 488, n.

CONDEMNATION.

Condemnation in a foreign court of Admiralty. *Vide* ADMIRALTY, No. 3. INSURANCE, No. 41.

CONDITION.

Vide AGREEMENT. BAIL, No. 6. BOND, No. 1, 2, 3, 4, 5.

CONDITION Precedent.

1. Instance where the vesting of a prior *limitation* is not a condition precedent in a will; *Bradford v. Foley*, H. 19 G. 3. 63 to 66
2. Instance where it is; *Doe v. Shiphard*, H. 19 G. 3. 75 to 79
3. Where the performance of one covenant is a condition precedent to another; *Kingston v. Preston*, B.R.E. 13 Geo. 3. 689 to 691
4. Instances of conditions precedent in policies of insurance. *Vide* INSURANCE, No. 45, 46. LEASE, No. 6.

CONDITIONAL Limitation.

In wills conditional limitations are all either

A Table of the Principal Matters.

either *contingent remainders*, or *executory devises*. Page 755, n. [1], 756

† CONFESSION of Parties.

† *Vide* ACKNOWLEDGMENT.

CONSCIENCE.

Vide COURT, No. 1.

✠ CONSIDERATION.

✠ 1. There is a sufficient consideration, in conscience, to support an action for a promise to pay a *debt*, discharged by an *insolvent debtors' act*; *Best v. Barber*, B. R. M. 23 Geo. 3. 101, n. [† 442]

✠ 2. *S. P.* (No. 2.) as to a debt discharged by *bankruptcy*; *Trueman v. Fenson*, B. R. H. 17 G. 3. *Cocksbott v. Bennett*, B. R. M. 29 G. 3. 101, n. [† 42 ✠]

CONSTABLE.

1. When entitled to double *costs*. *Vide* COSTS, No. 7.
2. When a constable may plead the *general issue*, and give matter of *justification* in evidence. 307
3. *Qu.* Whether an inhabitant of the city of *Oxford*, but entitled to the *privileges of the University*, is liable to serve the *office* of constable for the city. - 531 to 538
4. An *attorney* is not compellable to serve as a constable. - 538
5. Nor an *alderman* of *London*. 538
6. *Vide* INDICTMENT, No. 7. LEET, No. 1. PEACE-Officer.

CONSTRUCTION.

1. All *mercantile contracts* ought to have a liberal construction. - 277
2. Subsequent words in a *will* or deed may qualify the extent of prior general words. - 323
3. Instances where they have been held to do so. - 323
4. The palpable *mistake* of a word in a

deed shall not defeat the manifest intent of the parties. Page 384

5. When the computation of time is from or after an act done, the day when the act was done is to be included; *Rex v. Adderley*, M. 21 G. 3. 463 to 465
6. Observations on the rule in *Shelly's* case. 489, 491, 497, 501, 506, n. 508
7. That rule does not hold where the *estate for life* is in one conveyance, and the *limitation* to the heirs in another; *Doe v. Fonnereau*, M. 21 G. 3. - 487 to 509
8. *Vide* EQUITY, No. 2. MAXIMS, No. 2, 9, 10, 11, 17, 18. POWER, No. 3, 8.

CONTEMPT.

Vide ATTACHMENT, No. 4. WITNESS, No. 3.

CONTINGENCY.

The meaning of the terms "*double contingency*," or "*contingency with a double aspect*," 66, 494, 499, 502, 503, 504, & n. [2], 205, n.

CONTINGENT Debt.

Vide BANKRUPT, No. 13, 14, 15, 16, 17, 18, 19, 20.

CONTINGENT Remainder.

Vide REMAINDER, No. 6. WILL, No. 36.

CONTRABAND.

Vide SMUGGLING.

CONTRACT.

1. *Mercantile contracts* ought to have a liberal construction. - 277
2. *Vide* AGREEMENT. ALLEGATION, No. 4. ARTILLERY. ASSUMP. SIT, No. 4. BANKRUPT, No. 22. COURT, No. 5. EXECUTORY

A Table of the Principal Matters.

TORY, No. 1. GAMING, No. 1,
2. INDEMNITY. INSURANCE,
No. 41, 42, 43, 45, 46, 47. PART-
NER, No. 1. PRIVACY. USURY,
No. 4.

† CONVEYANCE.

† A *fine* and the *deed to lead the uses*,
are to be considered as one convey-
ance. - Page 45

CONUSEE, CONUSOR.

Vide FINE.

CONVICTION.

1. A conviction by a *justice of peace* is
void, unless it set forth the *evidence*;
Rex v. Read. M. 21 G. 3. 486, 487
2. Difference between convictions and
orders of justices. - 116, 663
3. Every conviction may be removed
into the court of *King's Bench* by
certiorari, unless where the power is
expressly taken away by statute. 549
4. A conviction by the *commissioners* of
excise under 12 Car. 2. c. 24. § 33.
cannot be removed by *certiorari*;
Rex v. Whitbread, M. 21 G. 3. 549
to 553
5. A conviction for using a gun, "be-
ing an engine for the destruction of
game," without adding that the par-
ty used it for the destruction of
game, is *void*; *Rex v. Hunt*, E. 15
G. 3. - 682, n. [1]
6. The *information* in a conviction for
killing game must negative all the
qualifications in 22 & 23 Car. 2.
c. 25.; *Rex v. Wheatman*, E. 20
G. 3. - 345, 346
7. *Vide ORDER*, No. 2.

CONVOY.

Vide INSURANCE, No. 8, 9, 20, 21,
33, 34, 46.

COPE.

Cope and lot, in lead mines, are *rate-*

able to the *poor*; *Rowlls v. Gell*, B.
R. E. 16 G. 3. Page 304, n. [1]

COPY.

1. The copy of a *marriage register* is
good *evidence*. - 174, 594, n.
2. And of *depositions* before *commissioners*
of *bankrupt*, when recorded accord-
ing to 5 Geo. 2. c. 30. § 41. 258,
n. [1]
3. And of entries in the *journals* of
parliament; *Rex v. Lord George*
Gordon, H. 21 G. 3. 593, &
n. [3]. 594, n.
4. And of the *transfer books* of the
East-India Company. 593, n. [1],
& 594, n.
5. And wherever the original is of a
public nature, though not a *record*.
594, n.

COPYHOLD.

1. *Qu.* If copyhold *estates* are included
in the word *hereditaments* in 27 El.
c. 4. § 2. - 716, n. [1]
2. One gross *fine* cannot be assessed
on the *admission* to several copyhold
tenements; *Grant v. Asple*, T. 21
G. 3. - 722 to 731
3. And if it is so stated (No. 2.) in
the *declaration* in an action for the *fine*,
(*Vide ASSUMPSIT*, No. 11.) it is
error, and not cured by *verdict*;
Grant v. Asple, T. 21 G. 3. 722,
731
4. *Qu.* Whether copyhold tenures arose
out of *villinage*. 724, n. 725, n.
5. *Vide FINE on Admission*, &c. No. 1.
HEREDITAMENT. MORTGAGE,
No. 14. *QUE Estate*. WILL, No.
34, 35.

CORONER.

A coroner is not liable to serve on
juries. - 190

CORPORATION.

1. The power of *amotion* is *incidental*
to the body at large in every cor-
poration, unless where it is expressly
confined

A Table of the Principal Matters.

- confined to a select part, by charter, bye-law, &c. *Rex v. Lyme Regis, E. 19 G. 3.* - Page 149 to 160
2. Therefore, in a return to a mandamus to restore, if it is stated that the party was removed by the body at large, it is unnecessary to aver that the power is vested in them; *Rex v. Lyme Regis, E. 19 G. 3.* 149 to 160
 3. If the party means to contend that it is confined to a select part, he must alledge it in reply to the return. 159
 4. Where non-residence is a good ground of amotion, it is unnecessary, before proceeding to remove the party, to summon him to come and reside; *Rex v. Lyme Regis, E. 19 G. 3.* - 149 to 160
 5. But the non-residence does not actually determine the office, till a judgment of amoval has been pronounced by the corporation; *Rex v. Heaven, B. R. M. 29 G. 3.* 157, n. [1 & 1]
 6. *Qu.* If the same nicety is required in a charge to ground a disfranchisement as in an indictment 182
 7. To prove the existence of an aggregate corporation consisting of different incorporated trades, entries of admission into the different trades, as into the company of carpenters, the company of plasterers, &c. are admissible evidence; the *Company of Carpenters v. Hayward, E. 20 G. 3.* 374-375
 8. The court will not decide the validity of the election of a corporator if the question is new or doubtful, on a rule to shew cause for an information in the nature of *quo warranto*; *Rex v. Godwin, E. 20 G. 3.* 397 to 401
 9. *Vide* CHARTER. CUSTOM, No. 1. INFORMATION, No. 4. STAMPS, No. 1.
- ### CORPORATOR.
- Vide* CORPORATION.
- ### COSTS.
1. The plaintiff in an action for taking his ship or goods, shall not have costs, although a verdict should pass for him, if the judge or court certify that there was probable cause of seizure as contraband. Page 107
 - + 2. A certificate that a trespass was wilful and malicious under 8 & 9 W. 3. c. 11. § 4. made out of court is void, and does not entitle the plaintiff to full costs. 108, n. [1 & 46]
 3. To entitle a defendant to costs under 3 Jac. 1. c. 15. § 2. & 4. when the damages are under 40s. he must shew that he is resident in the city of London. - 245, & n. [2]
 4. *Qu.* If he must not also shew that the plaintiff is. 245, n. [2]
 5. If the damages are under 40s. in *assumpsit* against an inhabitant of *Middlesex*, the defendant shall have double costs, whether the plaintiff sue in his own right, or as personal representative; *Wase v. Wyburd, M. 20 G. 3.* - 246, 247
 6. But a personal representative cannot be sued in the county court of *Middlesex*, and shall therefore pay costs, though the damages are under 40s. *Aitway v. Burrows, M. 20 G. 3.* 263, 264
 7. To entitle a constable, justice of peace &c. to double costs under 7 Jac. 1. c. 5. it must be certified by the judge who tried the cause, that the defendant acted by virtue or reason of his office; *Grindley v. Holloway, H. 20 G. 3.* - 307, 308
 - + 8. Unless (No. 7.) upon a special verdict, it appears by the facts there found, that the defendant was acting by virtue of his office; *Rann v. Pickin, B. R. M. 23 G. 3.* 308, n. [1 & 82]
 9. On a rule for an information, though the court may think a ground is laid, yet, if under the circumstance the payment of the prosecutor's costs appears an adequate punishment they will discharge the rule, on the defendant's undertaking so to do. *Rex v. Morgan, H. 20 G. 3.* 311
 10. In taxing costs, the contingent losses which witnesses may have suffered by obeying the subpoena cannot

A Table of the Principal Matters.

- not be allowed; *Thellusson v. Stophus*, T. 20 G. 3. - Page 438, 439
11. If there is a plea of tender as to part and *non assumpsit* as to the residue, and, the issue on the tender being found for the defendant, the balance proved is under 40s. yet the defendant, though within the jurisdiction of the county court of *Middlesex*, is not entitled to costs under 23 Geo. 2. c. 33. § 19.; *Heaward v. Hopkins*, M. 21 G. 3. 448, 449
12. Nor if the debt is reduced under 40s. by a *set-off*. - 448, 449
13. Where there are issues joined on several counts, and on some a verdict is found for the plaintiff, and on others for the defendant, the defendant shall not have costs on the part of the record on which the verdict is found for him; *Butcher v. Green*, E. 21 G. 3. 677, 678
14. Where the issue is found for the plaintiff on a special plea, or he has judgment on demurrer to such plea, he is to have costs, by 4 Ann. c. 16. § 5. - 678, n. [2]
15. *Qy.* If that clause of 4 Ann. (No. 14.) extends to cases where there is judgment for the plaintiff on a demurrer to a special plea, and afterwards a verdict for the defendant on the general issue. 678, n. [2]
16. If there are several issues on several special pleas of *justification*, and, on the general plea of *not guilty*, all are found for the plaintiff, except one of the special justifications, which is found for the defendant, but afterwards held insufficient in point of law, so that the plaintiff has judgment, the plaintiff shall not have the costs on such issue found for the defendant; *Kirk v. Nowell*, B. R. E. 26 G. 3. 678, n. [213]
17. An *avowant* shall pay costs on this special avowries found against him; *Jones v. Forsyth*, B. R. T. 23 G. 3. 709, n. [2]
18. And shall not have costs on the affirmance of a judgment in his favour on a writ of *error*. 709, n. [2]
19. On *trespass* for breaking the plaintiff's close, and digging up the soil upon the place in which, &c. and
- Vol. 11.

taking and carrying away the same, if the defendant plead *not guilty*, and a verdict is found for the plaintiff, but with damages under 40s. and the judge does not *certify*, he shall have no more costs than damages; *Clegg v. Molynaux*, T. 21 G. 3. Page 780, 781

20. *Vide* AGENT, No. 1. ALLEGATION, No. 2. HUSBAND, No. 4. PROHIBITION, No. 2. TRIAL, No. 7, 8.

COUNCIL.

The law committee of the Privy Council cannot send a *case* to a court of law for their opinion. 344, n.

COUNSEL.

Vide BARRISTER.

COUNT.

1. What *certainty* is necessary in a count. *Vide* CERTAINTY, No. 3.
2. *Vide* COSTS, No. 13. VERDICT, No. 6, 7.

COUNTRY.

When a plea, &c. should conclude to the country. *Vide* PLEADING, No. 12. TRAVERSE.

COUNTY.

1. The King cannot by charter authorize the trial of crimes out of the county where they were committed; *Rex v. Gough*, T. 21 G. 3. 791 to 798
2. *Vide* WALES, No. 4.

COUNTY Palatine.

A *cartonari* does not lie to remove civil proceedings from the courts of the counties palatine without special cause; *Zinck v. Langton*, T. 21 G. 3. 749 to 752

C c

COURT.

A Table of the Principal Matters.

COURT.

- † 1. Instances of what the court will take notice of. *Vide* CUSTOM, No. 10. PARLIAMENT, No. 1, 2.
- † 2. What they will not. *Vide* CUSTOM, No. 11. PRIVATE Statute, No. 2.
- † 3. Instances of what is within the province of the court, and what within the province of the jury. *Vide* DAMAGES, No. 5. INSURANCE, No. 28. INTEREST of money, No. 1, 2. JURY, No. 3. WITNESS, No. 1.
4. An action for *use and occupation* does not lie in the court of *conscience* for the city of London; *Woolley v. Cloutman*, M. 20 G. 3. Page 244 to 246
5. Nor any action for *rent*, or any real *contract*, or for any *debt* arising by reason of any cause concerning a *testament*, matrimony, or any thing concerning or belonging to the *ecclesiastical court*. - 245
6. Nor for any such matters (No. 5.) in the court of *requests* for the *Tower Hamlets*. - 245
7. An *inferior court* cannot grant a *new trial*. - 380
8. A court of *error* may award a *venire de novo*; *Grant v. Afle*, T. 21 G. 3. 722, 731
9. But not, it should seem, to an *inferior court*; *Trevor v. Wall*, B. R. E. 26 G. 3. 732, n. [† 157]
10. Court *Lect.* *Vide* LECT.
11. *Vide* ATTORNEY, No. 15, 17.

COVENANT.

1. No set form of words is necessary to constitute a covenant. - 27, 766
2. Any words amounting to an *agreement*, if under seal, are sufficient. 766
3. If there is a *power* for *husband* and *wife* jointly to declare the *uses* of a *fine* of the *wife's* estate, and the *husband* covenants with a *lessee* for *quiet possession* against any person *claiming under the husband*, his *executors* shall be liable if the *lessee* is *evicted* by a *remainder-man* claiming

under a joint execution of the power; *Hurd v. Fletcher*, M. 19 G. 3.

Page 43 to 45

4. A covenant for *rent* in a *lease* does not bind an *under-tenant*; *Holford v. Hatch*, E. 19 G. 3. 183 to 187
- † 5. If the whole of a *term* is made over by the *lessee*, although in the deed he reserves the *rent* and a power of *entry* for non-payment to himself and not to the original *lessor*, and although he introduce new covenants, the person to whom it is made over may sue the original *lessor* or his *assignee* of the *reversion*, or be sued by them, as *assignee* of the *term*, on the respective covenants in the original *lease*; *Palmer v. Edwards*, B. R. E. 23 G. 3. 187, n. [† 59], 188, n. [†]
- † 6. *Qu.* If such new covenants (No. 5.) are good. - 188, n. [†]
7. If one covenant to do a certain act in consideration of a reward, and the other party prevent the stipulated thing from being literally done, and accept something else as an equivalent, he may be sued for the reward, and the reason of the non-compliance with the literal terms averred in the declaration; *Holbam v. the East India Company*, M. 20 G. 3. 272 to 278. 684 to 695
8. Covenant will lie against an original *lessee* before he takes actual possession. 461
9. And against an *assignee* under an absolute *indefeasible assignment* of the whole interest in the term; *Walker v. Reeves*, B. R. M. 22 G. 3. 461, n. [1], to 463, n.
10. But not against a *mortgagee* of the term, even after the mortgage is *forfeited* till he takes actual possession; *Eaton v. Jaques*, M. 20 G. 3. 455 to 461
11. In a common *indenture* of *apprenticeship* under 5 El. c. 4. between the father, the son, and the master; the father is answerable in covenant for what is to be performed by the son; *Branch v. Ewington*, M. 21 G. 3. 518 to 519, & n. [2]
12. In a declaration in covenant, it is only necessary to state as much of the deed

A Table of the Principal Matters.

deed as will shew the plaintiff's title.

Page 667

13. And that need not be done *in hac verba*, but according to the legal effect. - - 667 to 669

14. Where something is covenanted or agreed to be done by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for non-performance of his part; *Jones v. Barkley*, 7. 21 G. 3. - - 685 to 695

15. So, if he was prevented by the neglect and default of the other party; *Hotham v. the East India Company*, B. R. H. 27 G. 3. 694, n. [O]

16. Where there are mutual and independent covenants, either party may recover damages for a breach by the plaintiff of the covenants to be performed by him. - - 690

17. Where covenants are conditional and dependant, the performance of the one is a condition precedent to the performance of the other; *Kingston v. Preston*, B. R. E. 13 G. 3. 689 to 695

18. Instances where covenants or agreements are conditions precedent, and where not. - - 684 to 695

19. Where a covenant goes to the whole of the consideration on both sides, it is a condition precedent; *Duke of St. Albans v. Shore*, C. B. T. 29 G. 3. - - 690, n. [O]

20. Instances where a party has done enough to entitle himself to an action of covenant or upon an agreement. 685 to 689

21. Instances where he has not. 685 to 693

22. *Vide* EQUITY, No. 2. *HUSBAND*, No. 1, 2.

COVENTRY.

Vide POOR-RATE, No. 10, 11.

COVERT, COVERTURE.

Vide HUSBAND.

CREDITOR.

Vide BANKRUPT. DECREE, No. 1.

CRIMINAL Conversation.

1. An action for criminal conversation is the only civil case, where the actual celebration of a marriage must be proved. - - Page 174

2. *Vide* EVIDENCE, No. 17.

CROSS Remainder.

Vide REMAINDER, No. 1, 2.

CROWN.

Vide ADMINISTRATION, No. 4. BASTARD, No. 2. EXCISE, EX-TENT, FORFEITURE, No. 1. NAVIGABLE River.

CRUISE.

Sense of the word "cruise" in policies of insurance. - - 528

CUSTOM.

1. A corporation being entitled to a customary duty on corn imported, a custom that factors, free of the corporation, shall receive to their own use, that part of the duty which arises from corn consigned to them as factors, is good in law; *Cockfedge v. Fanshawe*, E. 19 G. 3. 119 to 134
2. Instances of customs good in law, 126, 203
3. Of customs void in law. 204 to 206
4. A custom that tenants, whether by parole or deed, shall have the *way-going crop* after the expiration of their term, is good in law; *Wigglesworth v. Dallison*, T. 19 G. 3. 201 to 207, & n. [7], n. [8]
5. So is a custom that the inhabitants of a manor shall grind—all their corn, grain, and malt, which by them, or any of them, shall be used, or spent, ground within the manor—at certain mills; *Cort v. Birbeck*, T. 29 G. 3. - - 218 to 225

C c 2

6. But

A Table of the Principal Matters.

6. But if it were, that they shall grind — all their grain whatsoever by them spent or sold—at certain mills, it would be void. Page 221
7. A decree to establish a custom binds all persons in the same circumstances with the original defendants; the case of *Manchester Mills, Duc. Lanc. E. 30 G. 2.* - 222, n. [13]
8. In case of a direct breach of the custom such decree (No. 7.) may be revived by *scire facias*. 222, n. [13]
9. But where it is only evaded, the proceeding must be by supplemental bill. - 222, n. [13]
10. The court takes notice of such customs of London as have been certified by the recorder; *Elaquiere v. Hawkins, E. 20 G. 3.* 378 to 380
11. But will not take notice of the custom in London that an action shall lie for calling a woman "a whore" because it has not been certified. 380, n. [14]. *Staunton v. Jones, N. Pr. after M. 23 G. 3.* - 380, n. [196]. 381, n. [1]
12. But the city court takes notice of the customs of the city. 381, n. [1]
13. *Vide EVIDENCE, No. 18, 20.*

D.

DAMAGES.

1. THE plaintiff in an action for taking his ship or goods shall not recover more than two pence damages if the judge or court certify that there was probable cause of seizure for smuggling. - 107
2. A jury may give interest on book-debts in name of damages. - 376
3. A court of error may give interest as damages on the sum recovered by the original judgment, on the affirmation thereof; *Zinck v. Langston, B. R. T. 22 G. 3.* 752, n. [3], to 753, n.
4. Where there are entire damages on several counts, some of which are bad in law, it is error. 377-780, 731
5. If the court may not assess the

damages in all cases where there is judgment by default. Page 316,

n. [1]

6. Instance where this was done in an action on a promissory note; *Ragbligh v. Solomon, C. B. T. 29 G. 3.* - 316, n. [1]
7. *Vide BANKRUPTCY, No. 37, 38.*
- DEMURRER to Evidence, No. 3.
- PRIZE, No. 4. VERDICT, No. 2, 3.

DEBT.

1. An action of debt will lie on a foreign judgment, and without stating in the declaration or proving the ground of the judgment; *Walker v. Whiter, M. 19 G. 3.* - 1 to 7
2. Debt will lie wherever *indebitatus assumpsit* will. - 6
3. Instances of actions of debt in which it is not necessary to prove the exact sum laid in the declaration. 6, 732, n.
4. What evidence is sufficient in debt upon a bond where the subscribing witness cannot be produced; *Cogblan v. Williamson, H. 19 G. 3.* 93
5. What debts are provable under a commission of bankruptcy and discharged by the certificate *Vide BANKRUPT, No. 2, 11, 15, 16, 19, 38.*
6. What are not. *Vide BANKRUPT, No. 13, 14, 17, 20.*
7. *Vide WITNESS, No. 2.*

DECLARATION.

1. In a declaration in case for breach of a custom for inhabitants to grind at the plaintiff's mill, it is not necessary to state that the inhabitants "had and ought from time whereof, &c." nor that the mill is an ancient mill. 218, n. [11]
2. *Vide ALLEGATION. AMENDMENT, No. 1, 3. ASSUMPSIT, No. 7, 13. BILL of Exchange, No. 14, 23, 24. COPYHOLD, No. 3. COVENANT, No. 5, 7, 12. DEBT, No. 1, 3. HUSBAND, No. 1, 2. MALICIOUS Prosecution, No. 1 and Record. PLEADING, No. 6, 7, 8, 20, 21. MISDEMEANOR, No. 4. SHERIFF, No. 6.*

DECREE

A Table of the Principal Matters.

DECREE.

1. If any one *knowing* of a decree purchase, though for a *valuable consideration*, the purchase is *fraudulent* and *void* as against the *creditor* under the decree. - Page 88
2. Decree to establish a *custom*. *Vide* CUSTOM, No. 7, 8.
3. A decree which only recites part of the proceedings cannot be read in evidence without the bill and answer. 580

+ DEED.

1. A deed to lead the uses of a fine, and the fine are to be considered as the same conveyance. - 45
2. A mere *trustee* may prove the execution of the deed to himself. 141, n. [† 51]

DEFAULT.

1. Where there is *judgment* by default on a *bill of exchange*, or *promissory note*, they must be produced before the inquiry jury. 316, n. [2]
2. But need not be proved. 316, n. [† 2]
3. *Vide* DAMAGES, No. 5, 6, NON-PROS, No. 3.

DELIVERY.

Vide MORTGAGE, No. 8.

DEMAND.

1. A demand is necessary before a *landlord* can enter for non-payment of rent. - 483, 486
2. Unless where 6 months' rent is in arrear, and there is not a sufficient *distress* on the premises 483, 486
3. Or unless the necessity of a demand is waived by the tenant, by express agreement. - 486
4. In the case of land the demand may be on the most notorious

part of the land, and, of a house, in the house. Page 489, n. [c†]

5. A demand must be made on the acceptor before an *indorser* can be sued on a *bill of exchange*; *Rushben v. Aspinall*, T. 21 G. 3. 679 to 684

DEMESNE.

Tenant in *ancient demesne*. *Vide* TENANT, No. 1.

DEMURRER.

1. Examples of good causes for *special demurrer*. 94 to 97, 329 to 330, 683, n. [1]
2. Instance of what is not a cause for *special demurrer*. 4, n. [1], 5, n.
3. *Qu.* How far it is good cause that the *special plea* amounts to the *general issue*. - 649, n. [1]

DEMURRER to Evidence.

1. A demurrer to *evidence* admits the truth of every conclusion of fact which the jury *could* have inferred from the evidence demurred to; *Cocksedge v. Fanshawe*, E. 19 G. 3, 119 to 134, 224
2. On a demurrer to *evidence* the party cannot take advantage of any objection to the *pleadings*; *Cort v. Birkbeck*, T. 19 G. 3. - 318 to 325
3. When *evidence* is demurred to, the jury may assess the *damages* conditionally. - 222, n. [14]
4. If they do not, and judgment on the demurrer is given for the plaintiff, there shall be a writ of *enquiry*; *Cort v. Birkbeck*, T. 19 G. 3, 222 to 224
5. And after the execution thereof the party may move in arrest of the final judgment, on any objection to the *pleadings*; *Cort v. Birkbeck*, T. 19 G. 3. - 222 to 225

DEPUTATION for killing Game.

Vide GAME, No. 1.

C c 3

DEPO.

A Table of the Principal Matters.

DEPOSITION.

Depositions before *commissioners* of bankrupt, when recorded, or copies thereof, are evidence to prove the time of the *act* of bankruptcy if specified in them; *Janson v. Willson*, M. 20 G. 3. Page 257 to 260

DEVIATION.

Vide INSURANCE, No. 7, 22, 23, 24, 25, 26.

DEVISE, DEVISEE.

1. A devise is not a purchase within the meaning of 9 Geo. 1. c. 7.; *Rex v. Wivelingbam*, T. 21 G. 3. 767 to 770
2. *Vide* EXECUTORY Devise. MORTGAGE, No. 16. WILL.

DISCONTINUANCE.

Vide PENAL Action, No. 1.

DISCOUNT.

Vide USURY, No. 9.

DISCRETION.

Instances of the exercise of the discretionary power of the court. *Vide* ALLEGATION, No. 2. COSTS, No. 9. INFORMATION. OVERSEER. PRACTICE. RELEASE. TRIAL.

DISFRANCHISEMENT.

Vide CORPORATION, No. 1, 2, 3, 4, 5, 6.

DISTRESS.

1. In the notice for the sale of a distress under 2 W. & M. c. 5, it is not necessary to mention when the rent became due, for which the distress has

been made; *Moss v. Gallimore*, M. 20 G. 3. Page 279 to 283

2. A grantee or mortgagee, since 4 Ann. c. 16. § 9. may distrain before he has turned his right into actual possession by the attornment of the tenant; *Moss v. Gallimore*, M. 20 G. 3. 279 to 283
3. If a candle-maker or maltster forfeit the single duties, and then become a bankrupt, and is convicted after the assignment of his estate, the double duties may be distrained for, on the candles, malt, utensils and materials in the hands of the assignees; *Stracey v. Hulse*, T. 20 G. 3. 411 to 416. *The Attorney General v. Senior*, Scacc. 1739, 415, 416, n. [1]. *Rex v. Fowler*, Scacc. 19 G. 3. 415, 416, n. [2], 417, n.
4. Distress is not incident to a fee-farm rent as such, unless the case is brought within 4 Geo. 2. c. 28. § 5. *Bradbury v. Wright*, H. 21 G. 3. 624 to 628
5. *Vide* DEMAND, No. 2. PLEDGING, No. 9, 10. POOR-rate, No. 14.

DISTRINGAS.

When the proceeding against the former sheriff is by *distringas*, and when by attachment. - 464

DIVIDEND.

Vide BANKRUPT, No. 32, 33.

DIVIDING Point.

Vide INSURANCE, No. 6.

DOWER.

Vide SETTLEMENT, No. 19.

DRAWEE, DRAWER.

Vide BILL of Exchange.

EAST

A Table of the Principal Matters.

E.

EAST INDIA Company.

1. SEVERAL resolutions on the construction of the charter-parties of the East-India Company. Page 272 to 278
2. Copies of the transfer books of the East-India Company are evidence. 593, n. [3], 594, n.

ECCLESIASTICAL Court.

Vide APPARITOR. PROBATE. PROCURATOR. PROHIBITION. REGISTER.

ECCLESIASTICAL Lease.

Ecclesiastical leases can only be of lands formerly letten. - 573

EJECTMENT.

1. Ejectment will lie for a mine. 305
2. An attorney cannot be lessee in an ejectment. - 466, n. [1]
3. Where it is clear that the person in whom the legal estate is vested, is a mere trustee, he shall not avail himself of his title to defeat his *cestui que trust* from recovering in ejectment. 721, 722, 777
4. But *quere* as to that point; *Vide Doe, Lessee of Hoddesden, v. Staple, B. R. M. 29 G. 3.* 721, n. [† 154]
5. *Vide* MORTGAGE, No. 1, 2, 3, 4, 5. NOTICE, No. 1.

ELECTION.

1. *Vide* CORPORATION, No. 8. INFORMATION, No. 4. MAYOR.
2. *Vide* OPTION.

ELEGIT.

1. The sheriff on an elegit is not bound to deliver a moiety of each particular tenement and farm, but only certain

tenements and farms making, in value, a moiety of the whole; *Dent v. the Earl of Abingdon, M. 21 G. 3.*

Page 473 to 476

2. The land extended under an elegit must be set out by metes and bounds, 476, & n. [1]

EMBARGO.

The effect of an embargo on policies of insurance. *Vide* INSURANCE, No. 30, 32, 33, 34, 35, 36.

EMBLEMENTS.

Vide MORTGAGE, No. 11.

ENEMY.

Vide ALIEN Enemy. PRIZE.

ENQUIRY.

1. A writ of enquiry is not necessary where the action is on a covenant for the payment of a liquidated sum. 316
2. On the execution of a writ of enquiry in an action on a written instrument, the instrument must be produced. - 316, & n. [2]
3. *Vide* DAMAGES, No. 5, 6. DEMURRER to Evidence, No. 4.

ENROLLMENT.

1. What is evidence of the enrollment of a bargain and sale. *Vide* EVIDENCE, No. 4.
2. Of leases in the Duchy of Lancaster. *Vide* EVIDENCE, No. 5.

ENTRY.

1. Actual entry is necessary to avoid a fine. - 483, & n. [1], 485, 486
2. *Qu.* If it is not necessary to prevent the operation of the statute of limitations? - 485, n. [1]
3. So held, on a trial at bar, unless there be some special reason to the contrary; *Ford v. Grey, B. R. M. 2 Ann.* 485, n. [1 & 2]

C c 4

4. *Ac-*

A Table of the Principal Matters.

4. *Actual entry is also necessary to support trespass for mesne profits against one who was occupier when the title accrued, but not at the time of the judgment. Page 485, n. [15]*

EQUITABLE Estate.

1. Residence for forty days on an equitable estate gains a settlement; 631, 632. *Rex v. Wivelingham, T. 21 G. 3.* - 767 to 770
2. A devise of the surplus arising from the sale of land after payment of debts and legacies has an equitable interest in the land, and may keep the land, paying the debts and legacies. - 770
3. If the legal interest in land descend in fee simple *ex parte maternâ*, and the equitable interest in fee simple *ex parte paternâ*, or *vice versâ*, the equitable shall merge in the legal estate, and both follow the line through which the legal estate descended; *Goodright v. Wells, T. 21 G. 3.* - 771 to 780
4. *Vide EJECTMENT, No. 3.*

EQUITY.

1. In all cases of a purchase for valuable consideration equity must follow, not lead the law. - 22
2. The construction of covenants and agreements must be the same in equity and at law. - 277
3. So must the construction of powers. - 293
- + 4. In the case of an usurious contract equity will assist the debtor to retain all above legal interest if not paid. - 697, n.
- + 5. Or to recover back what has been paid above the principal and legal interest. - 698, n.
6. *Vide ASSIGNEE, No. 6. LEASE, No. 2.*

EQUITY of Redemption.

Instance where a court of law takes notice of the equity of redemption of a mortgagor, after the mortgage has been forfeited. *Vide ASSIGNEE, No. 4. MORTGAGE, No. 16.*

ERROR.

1. If error is assigned on a mistake in form, the mistake may be amended in the court below, pending the writ of error; *Richards v. Brown, E. 19 G. 3.* Page 114 to 115, & n. [1], 116, n.
2. And this in a penal action; *Richards v. Brown, E. 19 G. 3.* 114 to 115
3. An avowant is not a plaintiff within 3 Hen. 7. c. 10. and is not entitled to costs or damages on the affirmance by a court of error of a judgment in his favour. - 709, n. [2]
4. *Vide AMENDMENT, No. 1, 3, 4, 5, 6. COURT, No. 8. DAMAGES, No. 3, 4 EXCHEQUER Chamber. + Non-Prov, No. 8.*

ESTATE.

1. When general words in a will pass an estate for life, and when an estate in fee. - 417, 418, 759 to 764
2. A devise of "all my estate" or "all my interest," passes an estate in fee simple. - 763
3. But "all my lands in (or at) A." are words descriptive of locality, and pass only a life-estate. 434, 763
4. And this, although the testator should have marked his disapprobation of his heir at law by a legacy of 1s.; *Right v. Sidebotam, T. 21 G. 3.* - 759 to 764
5. In general, if an estate is given indefinitely without words of limitation, an interest for life passes. 756, n.
6. Settlement by estate. *Vide SETTLEMENT, No. 18, 19, 20, 21, 22, 23, 26, 27, 28, 29.*
7. *Vide EQUITABLE Estate. LEGAL Estate. LIMITATION.*

ESTOPPEL.

What certainty is necessary in estoppels. *Vide CERTAINTY, No. 5.*

EVIDENCE.

1. Parole evidence is admissible to rebut the

A Table of the Principal Matters.

- the refusing wife to the transfer of a
see; *Roe v. Popham*, M. 19 G. 3.
 Page 25 to 26
1. An implied revocation of a will may
 be rebutted by every sort of evidence.
 39
2. The writ of execution is not evidence
 of the judgment, unless against the
 party to the action in which the judg-
 ment was given. 41 8c n. (m)
3. The certificate of the auditor of the
 Duchy of Lancaster is sufficient evi-
 dence of the enrollment of a Duchy
 lease; *Kinnerley v. Orpe*, H. 19 G. 3.
 56, 58
4. So the indorsement by the proper
 officer is sufficient evidence of the
 enrollment of a bargain and sale.
 57, 58
5. In debt on a bond, if it is proved
 that the defendant admitted the debt,
 and that the attendance of the sub-
 scribing witness could not be procur-
 ed, it is sufficient to prove the hand-
 writing of the defendant, and of the
 witness; *Coghlan v. Williamson*, H.
 19 G. 3. 93
6. By stat. 26 G. 3. c. 57. § 38.
 deeds executed in the East Indies,
 when the subscribing witnesses reside
 there, are made evidence in Great
 Britain on proof of the hand-writing
 of the parties and of the witnesses.
 93, n. [C]
7. In an action by the assignees of a
 bankrupt, if the petitioning creditor's
 debt arises by bond, proof of the ac-
 knowledgment of the bankrupt, (the
 obligor) that he owed that debt, does
 not supersede the necessity of calling
 or accounting for the absence of the
 subscribing witness; *Abbot v. Plumbe*,
 T. 19 G. 3. 216, 217
8. Nor is such acknowledgment suf-
 ficient in the case of an action on the
 bond against the obligor. 216, 217
9. Matter of defence happening after
 the action brought, but before plea
 pleaded, may be given in evidence,
 in those actions where special matter
 may be proved on the general issue;
Sullivan v. Montague, H. 19 G. 3.
 106 to 113
10. An executor who takes no beneficial
 interest, is a competent witness to
 prove the testator's sanity; *Goodtitle*
v. Welford, E. 19 G. 3. Page 139
 to 141
11. Or any other matter concern-
 ing the will. 141, n. [151 C]
12. So is a bare trustee to prove the
 execution of the deed to himself.
 141 [151 C]
13. If a person interested execute a sur-
 render or release, he is an admissible
 witness, although the surrenderer,
 &c. should refuse to accept the sur-
 render or release; *Goodtitle v. Wel-*
ford, E. 19 G. 3. 139 to 141
14. It is no objection to an executor's
 testimony, that he may be liable to
 actions as executor *de son tort*. 141
15. When copies are evidence. *Vide*
Copy.
16. The minister and subscribing wit-
 nesses to the register are not the only
 competent witnesses to prove the
 identity of the persons married; *Birt*
v. Barlow, E. 19 G. 3. 171 to 175
17. One who has acted in breach of
 an alleged custom is not a competent
 witness to disprove the custom; *The*
Company of Carpenters v. Hayward,
 E. 20 G. 3. 374, 375
18. To prove the manner of conducting
 a particular branch of trade at one
 place, evidence may be given of the
 manner of conducting the same
 branch at another place; *Noble v.*
Kennaway, M. 21 G. 3. 510 to 513
19. Evidence of the custom of one ma-
 nor is not admissible to prove the
 custom of another manor. 513
20. Instance where evidence of opinion
 is not admissible; *Syers v. Bridge*, M.
 21 G. 3. 537 to 538
21. A witness is not bound to answer
 whether he is a papist; *Ren v. Lord*
George Gordon, H. 21 G. 3. 593
22. The acknowledgment of one out of
 several drawers of a joint and sever-
 al promissory note may be given in
 evidence on a separate action against
 any of the others, and will take the
 case out of the statute of limitations;
Whitcomb v. Whiting, E. 21 G. 3.
 652, 653, & n. [1]
23. Instance where a party offering
 what is not the best evidence, it shall
 be read if it make against him;
Berman

A Table of the Principal Matters.

Bermon v. Woodbridge, T. 21 G. 3.

Page 781 to 788

25. *Vide* BANKRUPT, No. 19, 37.
 CAPIAS, No. 3. CORPORATION,
 No. 7. DECREE, No. 3. DE-
 MURRER to Evidence. Feme Co-
 vert, No. 3. GAME, No. 3. IN-
 DICTMENT, No. 4. OPINION.

EXCHANGE.

Vide BILL of Exchange.

EXCHEQUER Chamber.

1. A writ of error from the King's Bench to the Exchequer Chamber cannot be quashed in the King's Bench; *Lloyd v. Skutt*, E. 20 G. 3. 350 to 353
- + 2. Nor in the court of Chancery; *Lloyd v. Skutt*, Canc. 353, n. [†91]
3. *Qu.* If a writ of error lies from the King's Bench to the Exchequer chamber in a *qui tam* action of debt. 351, 352
- + 4. Resolved, that it does; *Lloyd v. Skutt*, Cam. Scacc. 353, n. [†91]
5. *Qu.* If in any case when the action is by original. 352, & n. [3]
6. It does not lie in actions *de scandalis magnatum*. 351
7. On a writ of error from the King's Bench, only a transcript of the record is sent into the Exchequer chamber. 352, n. [3]
8. The statute of 3 Hen. 7. c. 10. extends to the court of error from the King's Bench in the Exchequer chamber. 752, n. [3]
9. Yet the practice of that court has been not to allow interest on the money recovered by the judgment below, when affirmed. 752, n. [3]
- + 10. But such practice has been departed from, and interest allowed there, in some late cases. 753, n. [†9]

EXCISE.

1. A penalty for not paying the excise duties upon candles, incurred before a bankruptcy, but not substantiated

by conviction till after, continues a lien upon the estate in the hands of the assignees, and may be distrained for; *Stracy v. Hulfe*, T. 20 G. 3. Page 411 to 416

2. So in the case of malt; *Attorney General v. Senior*; Scacc. 1739, 415, 416, n. [1], *Rex v. Fowler*, Scacc. 19 G. 3. 415, 416, n. [2], 417, n.
3. *Vide* CERTIORARI, No. 5. COMMISSIONERS of Excise.

EXCLUSIVE.

When a time specified is to be exclusive, and when inclusive. *Vide* "AFTER." "FROM." HUS and Cry.

EXECUTION.

1. If a plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use money which he has levied in an action at the suit of the defendant; *Armistead v. Philpot*, T. 19 G. 3. 231
2. *Vide* ELEGIT. EVIDENCE, No. 3. EXTENT. HUSBAND, No. 3. INSOLVENT Debtor, No. 7. JUDGMENT, No. 8, 9. NON-PROV, No. 6, 9. PARTNER, No. 2. SHERIFF, No. 1, 4, 6, 7.

EXECUTOR.

1. An executor cannot be sued in the county court of Middlesex; *Aileway v. Burrows*, M. 20 G. 3. 263, 264
2. *Vide* ADMINISTRATION. EVIDENCE, No. 11, 12.

EXECUTORY.

1. If money is paid on an illegal contract, while the contract remains executory the money may be recovered back, in an action for money had and received. 471

EXECUTORY Devise.

1. An executory devise of a real estate to B. after one to the heirs of the body

A Table of the Principal Matters.

body of *A.* is not too remote, because it must vest either in possession or as a remainder on the death of *A.*; *Doe v. Fonnerneau, M.* 21 G. 3. Page 487 to 509

1. *Vide* REMAINDER, No. 3, 4, 5.
- WILL, No. 27, 28, 29.

EXEMPTION.

1. *Prescriptive* exemptions from serving on juries are not taken away by any of the statutes concerning juries; *Rex v. Pugh, E.* 19 G. 3. 188 to 191
1. *Vide* CONSTABLE, No. 3, 4, 5.

EXTENT.

1. An extent of the Crown in case of a bankruptcy does not attach if issued after the assignment. - 415
1. Nor in the case of *actions*, if after judgment. - 415

F.

FEE-FARM.

1. A FEE-farm *rent* is a rent granted in fee, of at least one-fourth the value of the land at the time of the grant. - 627 & n. [1]
2. It may either be a *rent-service*, *rent-seck*, or *rent-charge*, 627, n. [1]
- † 3. Though some think the term is properly only applicable to *rents-service*. - 627, n. [† 128]

FELON, FELONY.

Vide FORFEITURE, No. 1. PEACE-Officer. RIOT, No. 4, 6.

FEME Covert.

1. A feme covert is capable of purchasing of others, without the concurrence of her husband, subject to disagreement, which will divest the estate; *Barnfather v. Jordan, M.* 21 G. 3. 452
2. Hence, in covenant for rent against an assignee, an assignment over before the rent accrued is a good plea though

the plaintiff reply that the assignee over is a feme covert; *Barnfather v. Jordan, M.* 21 G. 3. Page 452

3. A feme covert's will of personal estate, authorized by a power in a marriage settlement, cannot be given in evidence till proved in the ecclesiastical court; *Stone v. Forsyth, T.* 21 G. 3. 707 to 709

4. But the regular course in such cases is for the spiritual court not to grant probate of the will, but administration with the will (as a testamentary paper) annexed. 709n. [† 150†]
5. *Vide* HUSBAND.

FEOFFMENT.

If tenant *ex parte maternā* make a feoffment to the use of his maternal heirs, and the feoffee re-infeoff him expressly to the use of those heirs, yet the re-infeoffment shall enure to the paternal heirs; *Doe v. Putt, C. B.* T. 8 G. 3. 773, & n. [1], 775, & n. [2]. 776, n.

FICTION of Law.

Vide BILL, No. 1. MAXIMS, No. 5.

FINE.

1. Parole evidence is admissible to rebut the resulting use to the *conusor* in favour of the *conusee*; *Roe v. Popham, M.* 19 G. 3. 25 to 26
2. The fine and deed to lead the uses are to be considered as one conveyance. - 45
3. Actual entry is necessary to avoid a fine. 483, & n. [1], 485

FINE on Admission to a Copyhold.

1. Two years' rent, without any deduction for the *land-tax*, is fixed as the sum assessable for an arbitrary fine on admission to a copyhold estate; *Astle v. Grant, C. B.* 724, n. [2], to 727, n.
2. *Vide* ASSUMPSIT, No. 11, 12, 13.

FISHERY.

1. *Qu.* Whether there can be a several fishery without the ownership of the soil. 56
2. A

A Table of the Principal Matters.

2. A person who fishes in the fishery of another for the avowed purpose of giving rise to an action to try the right, is not liable to a penalty under 5 Geo. 3. c. 14.; *Kimmerley v. William Orpe*, M. 21 G. 3. Page 517, 518

FOREIGN Attachment.

Vide ATTACHMENT, No. 2, 3, 4

☞ FOREIGN Bill of Exchange.

☞ *Vide* BILL of Exchange, No. 10.

FOREIGN Judgment.

☞ 1. *Vide* ASSUMPSIT, No. 1. DERT, No. 1.

☞ 2. *Qu.* Whether foreign judgments are not *conclusives*, in this country, on the parties; *Galbraith v. Neville*, B. R. E. 29 G. 3. 5, n. [☞ 2]

☞ 3. Judgments of a foreign court of admiralty certainly are; *Bernardi v. Monnet*, H. 24 G. 3. 5, n. [☞ 1]

FOREIGN Ships and Property.

Vide INSURANCE, No. 31, 41, 50, 51.

FORFEITURE.

1. The goods of a felon vesting in the Crown by forfeiture are not subject to the debts of the felon. 545, 546
2. Forfeiture of a penalty in an agreement, bond, &c. *Vide* AGREEMENT, No. 6. ANNUITY, No. 1, 3, 4, 5. BAIL, No. 6. INSOLVENT Debtor, No. 1. LEASE, No. 6, 8.
3. Forfeiture of an office. *Vide* ALDERMAN, No. 1. CAPITAL Burgefs.
4. FORFEITURE under the excise laws. *Vide* DISTRESS, No. 3.

FORGERY.

Vide BILL of Exchange, No. 17, 19. INDICTMENT, No. 4. LIMITATION of Actions, No. 4.

FRAUD.

1. There may be cases which fraud will take out of the Statute of Limitations.

2. *Vide* BANKRUPT, No. 3, 4, 5, 6, 24, 25, 26, 30, 35, 36. DECREE, No. 1. INSURANCE, No. 13. JUDGMENT, No. 7. LIMITATION of Actions, No. 5, 6. MAXIMS, No. 6. PLEADING, No. 18. POWER, No. 9. RANSOM, No. 5. RELEASE, No. 2. SETTLEMENT, No. 18.

+ 3. The statute of frauds and perjuries. *Vide* the TABLE of Statutes after title STATUTE.

FREIGHT.

1. The freight is a lien on the cargo of the ship. - Page 104
2. No freight is due unless the ship arrive. - 541, 542

"FROM."

1. Instance when "from such a day" includes the day; *Pugh v. The Duke of Leeds*, B. R. M. 18 G. 3. 53, n. [15] & [☞ 1]
- ☞ 2. Instance where "from a place" is exclusive; *Rex v. Gamlingay*, B. R. H. 30 G. 3. 53, n. [15] [☞ 1]

G.

GAME.

1. A Lord of a hundred or wapentake cannot grant a deputation to kill game; *The Earl of Ailesbury v. Pattison*, M. 19 G. 3. 28 to 30
2. In a conviction for killing game the information must negative every one of the qualifications mentioned in 23 & 23 Car. 2. c. 25, *Rex v. Wheatman*, E. 20 G. 3. 345, 346
- ☞ 3. But the evidence needs not; *Rex v. Crowther*; H. 26 G. 3. 346, n. [☞ 1]
4. A conviction for using a gun, "being an engine for the destruction of game," is void, unless it add that the party used it for the destruction of game; *Rex v. Hunt*, E. 15 G. 3. 683, n. [1]

GAMING.

A Table of the Principal Matters.

GAMING.

1. *Contracts* as well as *securities* for money lost at play are void. Page 743
2. *Securities* but not *contracts* for money lent to play with are void. 741, 743
3. A bill of exchange or promissory note for money lost at play is void in the hands of an indorsee, though for valuable consideration, and without notice. 636, 743

GENERAL Issue.

- Vide* CONSTABLE, No. 2. COSTS, No. 15, 19. MIS-RECITAL, No. 2. PLEADING, No. 10, 11, 12.

GLOUCESTER.

Perjury being committed in the booth-hall within the limits of the county of the city of Gloucester, on the trial of a cause before a jury of the county at large, the indictment may be found and tried by juries of the county at large; *Reyn v. Gough*, T. 21 G. 3. 791 to 797

GRACE.

- 2y. Whether the drawer of a promissory note is entitled to days of grace. 63, & n. [2]

GREAT Sessions.

Vide WALES, No. 1, 3, 5.

GROATS.

Vide LORD'S AID.

† GROSSE Adventure.

- † What is a contract *a la grosse aventure*, explained. 291, n. [1]

H.

HABEAS Corpus.

1. THE court will not grant a *habeas corpus ad testificandum* to bring up a prisoner of war; *Furly v. Newnham*, T. 20 G. 3. 419, 420

2. What certainty is required in returns to writs of *habeas corpus*. *Vide* CERTAINTY, No. 2.

HEIR.

Words in a will tending to disinherit an heir at law, will not have that effect unless the estate is completely devised to another. Page 763

HEIRS.

1. Instances where the word "heirs" shall be construed to mean heirs of the body. 266, 267, & n. [1]
2. They may be so restrained, by subsequent words, in the case of a deed as well as of a will 266, n. [2]
3. When "heirs of the body" are words of limitation. 340 to 345
4. When words of purchase. 487 to 509, 506, n.
5. Where maternal shall be preferred to paternal heirs. *Vide* EQUITABLE Estate, No. 3.
6. Where the paternal heirs shall be preferred. *Vide* FROFFMENT.

HERBAGE and Pannage.

1. What passes by a grant of herbage and pannage. 303
2. 2y. Whether herbage and pannage are rateable to the poor. 302 to 305
3. The ranger of a royal park is not rateable for herbage and pannage; *Lord Bute v. Grindall*, B. R. T. 26 G. 3. 305, n. [d]
4. Ejectment or trespass will not lie for herbage and pannage. 304

HEREDITAMENT.

- 2y. If copyholds are included in the word "hereditaments" in 27 El. c. 4. § 2. 716, n. [1]

HIGH Treason.

Vide TREASON.

HIGHWAY.

1. If a parish, consisting of two districts which are bound to repair separately,

A Table of the Principal Matters.

- rately, be *convicted* for not repairing the road in one of the districts, the other having notice of the *indictment*, the court will consider it as being substantially the conviction of the district which ought to have repaired, and, if the *fine* has been levied on an *inhabitant* of the other, will grant a special *mandamus* for a rate on the district bound to repair; *Rex v. Townsend*, T. 20 G. 3. Page 421, 422
2. When a highway is overflowed or out of repair, passengers may *justify* going on the adjoining land. 746, 747, 749
- † 3. Statute of bridges and highways. *Vide* TABLE of Statutes after title STATUTE.

HIRING.

Settlement by hiring and service. *Vide* SETTLEMENT, No. 8, 9, 10, 11, 12, 13, 14, 15, 24.

HORSES.

1. Unsound horses. *Vide* WARRANTY.
2. Horses employed in drawing the artillery are *billetable* under the *mutiny* act, whether they belong to the *ordnance* or are furnished by *contract*; *Read v. Willan*, T. 20 G. 3. 422 to 426

HOSTAGE.

Vide RANSOM, No. 1, 4.

HOUSE of Commons.

✠ *Vide* JOURNALS.

HOUSES.

How to be rated for the poor. *Vide* POOR-rate, No. 15.

HOVERING.

HOVERING act. 609, & n. (a).

HUE and Cry.

Proceedings against the *hundred* on the *statute* of hue and cry must be commenced within a year after the rob-

bery committed, and the day on which it was committed is to be included in computing the year. Page 465

HUNDRED.

1. A lord of a hundred cannot appoint a game-keeper; *The Earl of Ailesbury v. Pattison*, M. 19 G. 3. 28 to 30
2. The hundred is not liable if the robber is taken within 40 days after the crime was committed. 704
3. *Vide* BLACK AB. HUE and Cry. RIOT, No. 1, 2, 3, 5.

HUSBAND.

1. In an action of *covenant* by the husband of tenant in fee, he must declare on a *seisin* in their *demefne* as of fee, in himself and his wife, in right of his wife; *Polyblank v. Hawkins*, H. 20 G. 3. 329, 330
2. If he declare on a *seisin* in his *demefne*, as of freehold, in right of his wife, it will be bad on special *demurrer*; *Polyblank v. Hawkins*, H. 20 G. 3. 329, 330
3. The husband cannot have *execution* for the *costs* on a plea of *coverture* found for the defendant, without a *scire facias*; *Wortley v. Rayner*, E. 21 G. 3. 637
4. *Vide* COVENANT, No. 3. SETTLEMENT, No. 1, 2.

I.

JAMAICA.

1. *Q. U.* Whether the statute of frauds extends to *Jamaica*. 38
2. It does not to *Barbadoes*. 38 n. [17]

IDENTITY.

What shall be evidence of identity in a question of actual marriage. *Vide* EVIDENCE, No. 15.

† IMMA.

A Table of the Principal Matters:

† IMMATERIAL.

Immaterial allegations in pleading. *Vide* ALLEGATION, No. 3.

IMPERTINENT.

Impertinent allegations in pleading. *Vide* ALLEGATION, No. 1, 2.

IMPLICATION.

1. When an *estate* shall be raised by implication, in a *will*. Page 492, 498, 501, 507, n. [3]
2. *Vide* PRESUMPTION. REMAINDER, No. 1, 2. RETURN, No. 4, 5.

INCLUSIVE.

When a time specified is to be inclusive and when *exclusive*. *Vide* "AFTER." "FROM." HUE and Cry.

INDEBITATUS *Assumpsit*.

Vide ASSUMPSIT, No. 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16. BANKRUPT, No. 32, 33, 34, 35.

INDEMNITY.

A mercantile policy of *insurance* is a mere *contract* of indemnity. 470, 786

INDENTURE.

Indenture of *apprenticeship*. *Vide* COVENANT, No. 11.

INDICTMENT.

1. An indictment is insufficient wherever all the facts charged *may* be true, and yet the party be innocent. 153
2. Another prosecution depending for the same crime cannot be *pleaded* in *abatement* to an indictment. 240, & n. [1]
3. The court will not quash an indictment on the motion of the prose-

cutor unless on the ground of *insufficiency*. Page 240, 241

4. The words "*purporting* to be a bank-note," in an indictment, mean that the note, upon the face of it, appears to be a bank-note, and the want of such appearance cannot be supplied by *evidence* of representations of the party when he disposed of it; *Rex v. Jones, M. 20 G. 3.* 300 to 302
5. An indictment for obstructing the execution of a *power* granted by *statute*, lies at common law, and ought not to conclude "*contra formam statuti*;" *Rex v. Smith, T. 20 G. 3.* 441 to 446
6. But an indictment for an offence created by *statute*, is bad, unless it conclude "*contra formam statuti*." 445

7. An indictment for not serving the *office* of *constable* under an appointment by a *corporation*, without shewing a right in the corporation to appoint by grant or *prescription*, is bad. 534, 536, 538

8. *Vide* CERTAINTY, No. 2. GLOUCESTER. MURDER, No. 2. TREASON, No. 1. VARIANCE, No. 1. VERDICT, No. 7.

INDORSEE, INDORSEMENT, INDORSOR.

Vide BILL of Exchange, No. 5, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22.

INFORMATION.

1. Another prosecution depending cannot be *pleaded* in *abatement* to any other but *qui tam* informations. 240, & n. [1]
2. It is a general rule, that in order to obtain an information for a private *libel*, charging a specific offence, the party libelled must deny the charge upon *oath*; *Rex v. Miller, M. 20 G. 3.* 284
3. The above rule (No. 2.) is invariable, unless the party is abroad at a great distance, or the charge is of criminal language held in *parliament*;

A Table of the Principal Matters.

- ment; Rex v. Huford, & v. Rite, E. 20 G. 3. Page 387 to 391*
4. In what cases the court will grant an information against justices of peace or magistrates of a corporation, on a charge of abusing their office to serve election purposes. 588 to 590
5. *Vide* Courts, No. 9. Overseer, No. 3.

INFORMATION *ex officio*.

1. The court will not give leave to quash one filed by the Attorney General; *Rex v. Stratton, M. 20 G. 3. 239 to 241*
2. But he may enter a *noli prosequi* upon it, and file another; *Rex v. Stratton, M. 20 G. 3. 239 to 241*

INFORMATION in the nature of *Quo Warranto*.

Vide CORPORATION, No. 8.

INFORMATION for killing Game.

Vide GAME, No. 2.

INHABITANT.

1. Inhabitants of market towns. *Vide* MARKET TOWNS.
2. *Vide* HIGHWAY, No. 1. † SETTLEMENT, No. 6.

INJUNCTION.

Vide TRIAL, No. 2.

✧ *INLAND* Bill of Exchange.

✧ *Vide* BILL of Exchange, No. 10.

INN of Court.

Vide BARRISTER, No. 2, 3.

INQUIRY.

Vide ENQUIRY.

INROLLMENT.

Vide ENROLLMENT.

INSOLVENCY.

1. The insolvency of a defendant, since the action brought, is good cause against judgment as in case of a nonsuit; *Bailly v. Wilkinson, E. 21 G. 3. Page 671*
2. *Vide* BILL of Exchange, No. 20. Supplement, No. 18.

INSOLVENT Debtor.

1. A discharge under the insolvent act of 16 Geo. 3. c. 38. does not protect the party against a covenant for payment of an annuity, as to payments accruing after his discharge, although a bond to secure the annuity was forfeited before the discharge; *Cotterel v. Hooke, H. 19 G. 3. 97 to 101*
2. But a discharge under 18 G. 3. c. 52. does (by § 39.) protect the grantor of an annuity from payments accruing after his discharge. 100
- † 3. A trader may be insolvent without being a bankrupt. 92, n. [f]
- † 4. If a person who has been discharged by an insolvent act, give a note for a debt which accrued before his discharge, there is a sufficient consideration to support an action on the new promise; *Best v. Barber, B. R. M. 23 G. 3. 101, n. [† 42]*
5. If a person who has been discharged by an insolvent act, brings an action and recovers on a promissory note made to him before his imprisonment, but not due till after his discharge, and which was not inserted in his schedule, he shall hold the money as a trustee for his assignees; *Brown v. Rivers, M. 21 G. 3. 472, 473*
6. By 18 Geo. 3. c. 52. the insolvent is protected against bonds executed before, though not payable till after, the day in the act; *Paget v. Wheatley, E. 21 G. 3. 669 to 671*
7. An action will not lie against the sheriff, or his officer, for taking a discharged insolvent in execution; *Tarlton v. Pyler, E. 21 G. 3. 671 to 672*

✧ *INSTAL*

A Table of the Principal Matters:

INSTALLMENTS.

Vide BANKRUPT, No. 15.

INSTANCE Court.

Difference between the instance court and the prize court of Admiralty.
Vide ADMIRALTY, No. 5.

INSURANCE, INSURED, INSURER.

1. A stipulation, though written on the margin of the policy, is a warranty; *Bean v. Stupart, M. 19 G. 3. 11 to 14 Kenyon v. Berthon, N. Pr. 19 G. 3. Page 12, n. [†]*
2. But if on a separate paper, though pinned or wafered to the policy, it is only a representation; *Parson v. Burneels, N. Pr. T. 18 G. 3. 12, n. 4. Biss v. Fletcher, N. Pr. 19 G. 3. 13, n.*
3. Difference between representations and warranties. 11 to 14, 260, 261, 262, 285, 289
4. Warranties in policies must be strictly complied with, but representations need only be fair and substantially true. 11 to 14, 11, n. [3], 12, n.
5. The word *seamen*, in a policy, extends to all the crew, including boys, cook, &c. *Bean v. Stupart, M. 19 G. 3. 11 to 14, 11, n. [3], 12, n. [4]*
6. If a ship sail on a voyage different from, although coinciding in part with, that insured, the policy is discharged, although the loss happen before the dividing point; *Woulridge v. Boydell, M. 19 G. 3. 16 to 18*
7. A deviation intended, if the loss happen before it take effect, does not discharge the policy. 18. *Thellusson v. Fergusson, E. 19 G. 3. 361 to 366*
8. A warranty "to sail with convoy" means the usual convoy for the voyage, and not a mere departure with convoy; *Lilly v. Ewer, H. 19 G. 3. 72 to 74, & n. [7]. 735, 736*
9. But in such a case (No. 8.) an unforeseen separation is no breach of the warranty. 74, 271 736
10. A ship and goods being insured

for a voyage, if the ship is taken and recaptured, and, after the recapture, the captain, acting fairly for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured may abandon, and recover as for a total loss; *Miller v. Fletcher, T. 19 G. 3. Page 231 to 235*

- † 11. An insurance upon a life is within the statute of 19 G. 2. c. 32. § 2. and therefore proveable under a commission of bankrupt, though the loss happen after the bankruptcy; *Cam v. Libbard, B. R. H. 24 G. 3. 166 n. [† 55], 167, n. [†]*
12. If the voyage is lost, or not worth pursuing, if the salvage is high, if further expence is necessary, if the under-writer will not at all events undertake to pay that expence, the insured may abandon, notwithstanding a recapture; *Miller v. Fletcher, T. 19 G. 3. 231 to 235*
13. If goods are insured on board a ship from London to Nantz, with liberty to call at Ostend, and she is cleared only for Ostend, but sails directly for Nantz, that being the known course of the trade, in order to save certain duties both here and in France, there is no fraud on the under-writer, so as to discharge the policy; *Planché v. Fletcher, M. 20 G. 3. 251 to 254*
14. If an insurance is made before the commencement of hostilities, but when an immediate war is universally expected, the insured is not bound to give the under-writer notice though the ship does not sail till after the war commences; *Planché v. Fletcher, M. 20 G. 3. 251 to 254*
15. In such case (No. 14.), upon a policy in the usual form, the under-writer will be liable for a loss by capture; *Planché v. Fletcher, M. 20 G. 3. 251 to 254*
16. An insurance on a voyage expressly prohibited by the laws of this country is void; *Johnson v. Sutton, M. 20 G. 3. 254, 255*
17. On a representation that a ship was seen safe on such a day, at a certain latitude or point in the voyage, if

A Table of the Principal Matters.

- it turn out that she had got safe to the point represented, but was lost two days before the day mentioned, the difference (though by mistake) is material, and discharges the policy; *Masdonall v. Frazer*, M. 20 G. 3. Page 260 to 262
18. If the insured represents material facts, without knowing them to be true, he takes the risk of their being so on himself. 261
19. So, If the agent of the underwriter does so, his principal is liable; *Fitzherbert v. Mather*, B. R. M. 26 G. 3. 261 n. [19]
20. In a policy on goods shipped on board a certain ship, to return part of the premium "if sails with convoy and arrives," the arrival of the ship is what is meant, and the full return is to be made on the whole sum insured, though there should be an average loss on the goods; *Simond v. Boydell*, M. 20 G. 3. 268 to 272
21. It is not necessary under such a policy (No. 20) that the ship should arrive in company with the convoy; *Simond v. Boydell*, M. 20 G. 3. 268 to 272
22. If an insured ship quit the course described in the policy from necessity, she must pursue the new voyage of necessity, in the direct course, and in the shortest time, otherwise the policy will be discharged; *Lavabre v. Wilson*; *Bize v. Fletcher*; *Lavabre v. Walter*; M. 20 G. 3. 284 to 291
23. On an *East-India voyage*, under a policy—"At and from Port L'Orient to Pondicherry, Madras and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch, in the outward or homeward bound voyage, at the Isles of France and Bourbon, and at all or any other place or places, what or wheresoever, and that it shall be lawful for the said ship, in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope, without being deemed a deviation."—The general words are qualified and restrained, by the expressions, "in the outward or homeward bound voyage," and, "in this voyage," to mean all places in the usual course of the voyage to and from the places mentioned in the policy; *Lavabre v. Wilson*; *Lavabre v. Walter*, M. 20 G. 3. P. 284 to 286
24. Under such a policy (No. 23) it is a deviation to go to Bengal; *Lavabre v. Wilson*; *Lavabre v. Walter*, M. 20 G. 3. 284 to 291
25. A policy being—"At and from L'Orient, to the isles of France and Bourbon, and to all or any ports and places, where and whatsoever, in the East-Indies, China, Persia, or elsewhere, beyond the Cape of Good Hope, from place to place, and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival in France"—although the insured, by a representation, waived to the policy at the time of under-writing, state—"that the ship intends to sail in September or October, and to go to Madeira, the isles of France, Pondicherry, China, the isles of France, and L'Orient"—if the insured really intended that the ship should sail as early as represented, and that she should go to China, the policy is not discharged, though he afterwards change his intention, and the ship does not sail till December, and goes to Bengal, and not to China; *Bize v. Fletcher*, N. Pr. after E. 20 G. 3. 284 to 289
26. A deviation from necessity must be justified, both as to substance and manner. 291
27. A representation made to the first underwriter extends to all the others; *Barber v. Fletcher*, M. 20 G. 3. 305, 306
28. A representation, that a ship is expected to sail on such a day from the coast of Africa, is not material so as to discharge the policy, though it turn out, that she actually sailed six months before; *Barber v. Fletcher*, M. 20 G. 3. 305, 306
29. If facts not disclosed by the broker for the insured, in a representation of the state of the ship, appear material

A Table of the Principal Matters.

rial to the jury, though they did not to the broker, who, merely on that account, abstained from mentioning them, the insurance is void; *Shirley v. Wilkinson*, B. R. M. 22 G. 3.

Page 306, n. [† 81]

30. Where there is a stipulation in a policy, on a foreign ship, that the policy shall be sufficient proof of interest, and there is judgment by default, the plaintiff, on the writ of enquiry, need only prove the defendant's subscription, without giving any evidence of interest; *Thellusson v. Fletcher*, H. 20 G. 3. 315, 316

31. Policies on foreign ships and property are not within the statute of 19 Geo. 2 c. 37. 316

32. On a warranty to sail from Jamaica, on or before a day certain, if the ship departs from her port of loading on that day, with all her cargo and clearances on board, and proceeds to the place of rendezvous on the island, expecting to find a convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, though the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready; *Earle v. Harris*, E. 20 G. 3. 357 to 359

33. So, a French ship being warranted to sail from Guadaloupe on or before a day certain, if she take in all her cargo and clearances, and leave her port of loading before the day, and sail to another part of the island, in the direct course of her voyage, merely in the hopes of joining convoy, and to take the governor's dispatches for France, the warranty is complied with, though the governor there should detain her beyond the day, and although it should be a condition inserted in one of her clearances, "that she should pass that way to take the orders of government;" *Thellusson v. Fergusson*, E. 20 G. 3. 361 to 366. *Thellusson v. Staples*, N. Pr. after E. 20 G. 3. 366, n. [9], 367, n.

34. So, if a ship is insured at and from

Jamaica, warranted to sail, or to have sailed, on or before a day certain, if she sail on the day, from her port of loading, with all her cargo and clearances on board, to another part of the island, for the sake of joining convoy, that being the usual place of rendezvous, the warranty is complied with, although such place be out of the direct course of the voyage, and the ship is detained there, by an embargo, till after the day; *Bond v. Nutt*, B. R. E. 17 G. 3. Page 366, n. [9], to 370, n.

35. Yet the ship in such case (No. 34.) would be protected under the words "at Jamaica," in sailing between the two places. 370, n.

36. If a ship, warranted to sail on a day certain, gets under sail on the day, with intent to pursue her voyage, the warranty is complied with, though she should be obliged to put back instantly by an embargo, before she gets out of the harbour; *Thellusson v. Fergusson*, N. Pr. 369, n. 370, n. *

37. An insurance being made without interest, and the premium paid, the insured shall not recover it back; *Lowry v. Bourdieu*, M. 21 G. 3. 468 to 472

38. So, in the case of a re-assurance, void, by 19 G. 2. c. 37; *Andree v. Fletcher*, B. R. E. 29 G. 3. 471, n. [C]

39. An under-writer is presumed to know the nature and peculiar circumstances of the branch of trade to which the insurance relates; *Noble v. Kennoway*, M. 21 G. 3. 510 to 513

40. An insurance, "with liberty to cruise six weeks," means six weeks successively, from the commencement of the cruise; *Syers v. Bridge*, M. 21 G. 3. 527 to 531

41. The ship and goods being warranted neutral, a condemnation by a foreign court of Admiralty is not conclusive evidence that they were not neutral, unless it appear that the condemnation went on that ground; *Bernardi v. Moitteux*, H. 21 G. 3. 575 to 583

42. When a ship is insured against capture

A Table of the Principal Matters.

- ture for twelve months, at the rate of so much per month, making a specified gross sum, though the risk cease before the end of two months, by the loss of the ship in a storm, there shall be no apportionment nor return of premium, the contract being entire; *Loraine v. Thomlinson*, H. 21 G. 3. Page 585 to 588
43. So, if a ship is insured for twelve months, at a gross sum, warranted free from captures, there shall be no apportionment nor return, though the risk cease, by the capture of the ship, before the expiration of the twelve months. 587, 784, 785
44. So, if there is an insurance on a ship and goods—at and from A. to B, during her stay and trade there, at and from thence to her port or ports of discharge in C, and at and from thence back to A.—it is an entire contract, and, if the loss happen at any time after the commencement of the risk, there shall be no apportionment nor return; *Bermond v. Woodbridge*, T. 21 G. 3. 781 to 789
45. So, if there is an insurance upon a life for a year, with an exception as to suicide and the hands of justice, if the party die in either of those ways within the year, there shall be no apportionment nor return. 785, 789
46. But if the policy is—"at and from London to Halifax in Nova Scotia, warranted to depart with convoy from Portsmouth"—the risk and contract are divisible, and, if the ship depart from Portsmouth without convoy, there shall be an apportionment and return of so much as was paid for the voyage from Portsmouth to Halifax, to be ascertained by the jury, the commencement of any risk from Portsmouth depending on the condition precedent of a departure from thence with convoy. 587, 786, 790
47. So, if the policy is—"at and from A. warranted to sail on a day certain,"—the risk and contract are divisible, the risk from A. depending on the condition precedent of a departure on the day, and, if there is no departure on the day, there shall be an apportionment and return. Page 785, & n. [1], 790
48. It is a general principle, that, where the risk has begun, though it should cease immediately, there shall be no return of premium. 588, 789
49. And, in all cases, when the risk never has begun, there shall be a return. 588, 789
50. Under a warranty, that the ship and cargo are neutral property, it is sufficient if they are so when the risk commences; *Eden v. Parkison*, T. 21 G. 3. 732 to 736
51. If such a warranty is false, though the loss should not happen in consequence of the property not being neutral, the policy is void. 733, n. [1]
52. In *assumpsit* for a total loss, an average loss may be given in evidence. 732, n. & n. [1]
53. Where there has only been an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, the plaintiff entering into a rule to account to the underwriters for what part of the insured property he shall recover; *Barber v. French*, M. 20 G. 3. 294

INTENDMENT.

Vide IMPLICATION. PRESUMPTION.
ORDER. REMAINDER, No. 1, 2.
RETURN, No. 4, 5.

INTEREST.

Vide EVIDENCE, No. 6, 7, 8, 9, 10,
11, 12, 13, 14, 15, 18, 22. IN-
SURANCE, No. 30, 31, 37.

INTEREST of Money.

1. The jury may allow interest on book debts, in name of damages. 376
2. Interest may be allowed by the court, upon the affirmance of a judgment for the plaintiff, on the sum for which the original judgment was given, from the date thereof to the time

A Table of the Principal Matters.

time of the taxation of costs; *Zinck v. Langton*, B. R. E. 22 G. 3.

Page 752, n. [3], 753, n.

3. But this is not of course in all cases.

753, n.

4. If by the course of the court of error, interest is not computed in the allowance of costs, on the affirmance of the judgment, the jury may give interest, by way of damages, from the time of signing the original judgment; *Eutwistle v. Shepherd*, B. R. M. 28 G. 3. 753, n. [a]

5. In debt on a recognizance against bail in error in *Cam. Scacc.* the bail are not liable to interest for the time intervening between the original judgment and the affirmance. 753, n. [a]

6. But the bail in error in B. R. are (No. 4.); *Frith v. Leroux*, B. R. M. 28 G. 3. 753, n. [a]

7. *Vide EXCHEQUER Chamber*, No. 9, 10.

INTESTATE.

Vide ADMINISTRATOR. BASTARD, No. 2.

JOURNALS.

1. Copies of entries in the journals of parliament are evidence; *Rex v. Lord George Gordon*, H. 21 G. 3. 593, & n. [3] n. [4]

2. The journals of the House of Commons are records. 593, n. [a]

IRREGULARITY.

Vide AGENT, No. 3. *PRACTICE*, No. 1, 2, 7, 8, 11.

ISSUE.

1. When the special matter may be given in evidence under the general issue. *Vide CONSTABLE*, No. 2. *EVIDENCE*, No. 10. *JUDGMENT*, No. 4. *PLEADING*, No. 10, 11, 12.

2. *Qu.* Whether the court will ever award a *repleader* on the application of the party who has taken an immaterial issue. 396, 747

JUDGMENT.

1. *Indebitatus assumpsit* will lie on a foreign judgment; *Crawford v. Whit-tal*, B. R. H. 13 G. 3. 4, n. [1].

5, n. *Plaislow v. Van Uxem*, *Cam. Scacc.* T. 18 G. 3. Page 5, n.

2. So will debt; *Walker v. Witter*, M. 19 G. 3. 1 to 7

3. In declaring on a foreign judgment, it is not necessary to shew the ground of the judgment; *Walker v. Witter*, M. 19 G. 3. 1 to 7. *Crawford v. Whit-tal*, H. 13 G. 3. 4, n. [1], 5, n. *Plaislow v. Van Uxem*, *Cam. Scacc.* T. 18 G. 3. 9, n.

4. But the defendant may give evidence to impeach it under the plea of *nil debet*; *Walker v. Witter*, M. 19 G. 3. 1 to 7

5. But *Quere* as to that point (No. 4.) *Vide FOREIGN Judgment*, No. 2.

6. If a foreign judgment is called a record in the declaration, and the conclusion is *prout patet per recordum*, it is *surplusage*, and not traversable by a plea of *nul tiel record*; *Walker v. Witter*, M. 19 G. 3. 1 to 7

7. If one, knowing of a judgment, purchase, though for a valuable consideration, the purchase is fraudulent and void against the judgment creditor. 88

8. The writ of execution is not evidence of the judgment, except against the parties to such judgment. 41, 42, & n.

9. A judgment entered before an extent is sued out shall be preferred. 415

10. *Vide AMENDMENT*, No. 4, 5. *DEFAULT. DEMURRER to Evidence*, No. 4, 5. *EXTENT*, No. 2. *PRACTICE*, No. 1. † *Non-Pros.*

JURY.

1. If the inhabitants of a district have enjoyed a prescriptive exemption from serving on juries, they are not liable to serve under any of the statutes relative to juries; *Rex v. Pugh*, E. 19 G. 3. 188 to 191

2. Instances of persons exempted from serving on juries. 190

D d 3 3. In-

A Table of the Principal Matters.

3. Instances of what the jury is to judge of. *Page* 515, † 555, n. [†], 681
4. *Vide* DEMURRER to Evidence, No. 3. GLOUCESTER. MIDDLESEX, No. 3.

JUS belli.

Vide PRIZE, No. 7. RANSOM, No. 2, 3, 6.

JUSTICE of Peace.

1. When a justice of peace is entitled to double costs under 7 Jac. 1. c. 5. *Vide* COSTS, No. 17.
2. In what cases he may plead the general issue; and give the special matter in evidence. 307
3. The court will not grant an information against a justice of peace who has erred merely from ignorance. 427
- † 4. The jurisdiction of justices of the peace and commissioners of excise, are, as to the excise laws, exactly the same, within their respective jurisdictions. 555, n. [†]
5. *Vide* BASTARD, No. 3, 4. CONVICTION, No. 1, 2, 3, 5, 6. INFORMATION, No. 4. ORDER. RELIEF, No. 4.

JUSTIFICATION.

Vide CONSTABLE, No. 2. COSTS, No. 16. HIGHWAY, No. 2. JUSTICE of Peace, No. 2. WAY, No. 2. TRESPASS *vi & armis*, No. 7.

JUSTIFICATION of Bail.

Vide BAIL, No. 2.

K.

KING.

Vide ADMINISTRATION, No. 4: BASTARD, No. 2. EXCISE. EXTENT. FORFEITURE, No. 1. NAVIGABLE River. OFFICER.

KING's BENCH.

1. The court of King's Bench has power to remove every conviction by certiorari, unless where that authority is taken away by statute. *Page* 549
2. *Vide* EXCHEQUER Chamber.

L.

LANDLORD.

1. THE statute of 8 Ann. c. 14. § 1. extends only to the immediate, and not to a superior, or ground landlord; *Master Bennet's case*, B. R. M. 1 G. 2. 665, n. († 1)
2. The effect of that statute may be obtained by motion; *Darling v. Hill*, B. R. E. 19 G. 2. 665, n. († 2)
3. *Vide* DEMAND, No. 1, 2, 3, 4. LAND-Tax, No. 1. LEASE, Poor-Rate, No. 14. RELEASE, No. 2. SETTLEMENT, No. 5, 6, 7. VARIANCE, No. 8, 9.

LAND-Tax.

- † 1. The land-tax is not peculiarly a landlord's tax with respect to the public. 227, n. [†]
2. A grantee of a *fee-farm rent*—“without any deduction, defalcation, or abatement, for or in any respect whatsoever”—is entitled to the full rent, without deducting the land-tax; *Bradbury v. Wright*, H. 21 G. 3. 624 to 628
3. The land-tax is not to be deducted out of the two years' value payable as an arbitrary fine for admission to a copyhold estate; *Affle v. Grant*, C. B. 724, n. [2], to 727, n.
4. *Vide* SETTLEMENT, No. 5, 6, 7.

LATITAT.

1. A *latitat* may be taken out before the cause of action accrues. 62
2. A writ of *latitat* runs into *Wales*; *Penry v. Jones*, T. 19 G. 3. 213; *Lloyd*

A Table of the Principal Matters.

Lloyd v. Jones, B. R. T. 9 G. 3.
Page 213, n. [10]

L E A S E.

1. A lease void in its creation as against a remainder-man, does not become valid by his accepting rent and suffering the lessee to make improvements after his remainder vests in possession; *Doe v. Butcher*, M. 19 G. 3. 50 to 53
- † 2. But *Qu.* Whether equity would not relieve in such a case. 54, n. [† 26]
3. A lease by the husband of a *feme covert's* estate (though not within 32 Hen. 8. c. 28.) is only voidable. 53, n. [17], 54, n.
4. But a mortgage of a *feme covert's* estate, though in form of a lease, is void; *Goodright v. Strauban*, B. R. M. 15 G. 3. 53, n. [n. 17], 54, n.
5. Under a proviso, that all assignments of a lease shall be void if not enrolled, under-leases are not included; *Kinnerley v. Orpe*, H. 19 G. 3. 56 to 58
- † 6. Where a lease is *ipso facto* void, by the condition or limitation, no acceptance of rent afterwards can make it have continuance as between the grantor and grantee. 57, n. [† 29], 58, n. [†]
- † 7. Otherwise it is of a lease voidable only. 57, n. [† 29], 58, n. [†]
8. An under-lease is not an assignment, to the effect of working a forfeiture under a proviso not to assign. 57, 184
- † 9. But under a proviso—"that the lease shall become void, in case the lessee, his executors or administrators, shall, at and during the said term, set, let, or assign over, the said hereby demised messuage or dwelling-house, or any part thereof,"—a demise by the lessee's *administratrix* for a term a day short of the expiration of the original lease, is bad; *Roe, lessee of Gregson, v. Harison*, B. R. E. 28 G. 3. 57, n. [†]
10. The landlord cannot sue an under-tenant on the covenant for rent; *Holford v. Hatch*, E. 19 G. 3. 183 to 187
- † 11. When the whole term is made

over by the lessee, although in the deed by which that is done, the rent and a power of entry for non-payment, is reserved to him, and not to the original lessor, this is an assignment, and not an under-lease; *Palmer v. Edwards*, B. R. E. 23 G. 3.

Page 187, n. [† 59] 188, n. [†]
† 12. And in such case, (No. 10.) the original lessor, or his assignee of the reversion, may sue or be sued, on the respective covenants in the original lease; *Palmer v. Edwards*, B. R. E. 23 G. 3. 187, n. [† 59], 188, n. [†]

† 13. And this (No. 11.) although new covenants are introduced in the assignment; *Palmer v. Edwards*, B. R. E. 23 G. 3. 187, n. [† 59], 188, n. [†]

† 14. What cannot be supported as an assignment, shall be good as an under-lease, against the party granting it. 188, n. [†]

† 15. A proviso—that a lease shall become void upon the lessee's committing an act of bankruptcy, and being found a bankrupt—is good; *Roe lessee of Hunter, v. Galliers*, B. R. M. 28 G. 3. 184, n. [†]

16. *Vide COVENANT*, No. 4, 5, 6, 8, 9, 10. *ECCLESIASTICAL LEASE*, MORTGAGE, No. 2, 3, 4, 5, 6, 10. *POWER*, No. 1, 2, 5, 6, 7, 9.

L E E T.

1. The appointment of constables is incidental to a court leet. 537
2. No man can be of two leets, *ibid.*

L E G A C Y.

1. Land may pass under the word "legacy." 40, & n. [†]

L E G A L Estate.

Vide *EQUITABLE Estate*, No. 3. MORTGAGE, No. 3, 17.

LESSEE, LESSOR.

Vide *EJECTMENT*, No. 2. LEASE.

A Table of the Principal Matters.

LETTERS PATENT.

Vide OYER, No. 4.

LIBEL.

Vide INFORMATION, No. 2. 3.

LIEN.

1. The captain of a ship has no lien on the ship for wages, stores, or repairs done in England; *Wilkins v. Gar-michael*, H. 19 G. 3. Page 101 to 105
2. Freight is a lien on the cargo 104
3. An attorney has a lien on his client's deeds, papers, and money, for his bill. 104, 105, 238
4. *Qu.* Whether an officer of a court of justice has a lien on the records of the court for his fees. 194, n. [26], 195
5. If a candle-maker, being in arrear for the single duties, become a bankrupt, and is convicted after the assignment of his estate, the double duties are a lien on the candles, utensils and materials in the hands of the assignees; *Stracy v. Hulse*, T. 26 G. 3. 395 to 416
6. So, in the case of malt; *The Attorney General v. Senior*, Seacc. 1737, 415, 416, n. [1], *Rex v. Fowler*, Seacc. 19 G. 3. 416, n. [2], 417, n.

LIFE.

1. What words shall pass an estate for life. *Vide* ESTATE, No. 1, 3, 4, 5.
2. Powers to tenants for life. *Vide* POWER, No. 1, 2, 4, 5, 6, 7.
3. Insurance on a life. *Vide* INSURANCE, No. 11, 45.

LIMITATION.

1. When a limitation over can only take effect on the event of a prior limitation first taking effect; *Doe v. Shippard*, H. 19 G. 3. 75 to 79, 505, n.
2. When it can only take effect on the alternative of a prior limitation not

taking effect. Page 264 to 268, 304, n. 505, n.

3. Of the different classes of limitations over. 504, n. 505, n.

LIMITATION of Actions.

1. All *qui tam* actions on any statute made or to be made (except the statute of tillage) shall be brought within one year after the offence committed. 235, p. [15]
2. A bill may be filed in vacation against an attorney, to prevent the statutes of limitation from attaching. 313
3. *Qu.* If actual entry is necessary to prevent the statute from attaching, so as to bar a possessory right. 485, n. [1]
4. So held, on a trial at bar, unless there be some special reason to the contrary; *Ford v. Gray*, B. R. H. 2 An. 485, p. [15]
5. A personal representative having found among the papers of the deceased a mortgage deed, and having assigned it for the mortgage money more than six years ago, affirming and reciting in the deed of assignment, that it was a mortgage deed made or mentioned to be made between the mortgagor and mortgagee for that sum, the assignee shall not recover back the mortgage money, although it shall turn out that the mortgage was a forgery, and that the assignee did not discover the forgery till within 6 years before he brings his action, unless the assignor knew of the forgery; *Bree v. Holbach*, E. 21 G. 3. 654 to 657
6. There may be cases which fraud will take out of the statute of limitations. 656
7. *Vide* BILL, No. 3.

LONDON.

Vide ALDERMAN, No. 2. ATTACHMENT, No. 2, 3. CUSTOM, No. 10, 11, 12. COSTS, No. 3, 4.

LORD'S

A Table of the Principal Matters.

LORD'S ACT.

1. The *groats* allowed under 32 Geo. 2. c. 28. (called the Lords' act) must be made payable and be paid on every *Monday*, whatever may be the day on which the defendant is brought up to be discharged and is remanded at the instance of the plaintiff; *Lench v. Pargiter*, H. 19 G. 3. Page 68, 69
2. An order of a Judge under that act, made out of term, is final; *Lench v. Pargiter*, H. 19 G. 3. Page 68, 69

LOSS.

Vide INSURANCE.

LOT.

Lot and Cope. *Vide* COPE.

LOTTERY.

Construction of 17 Geo. 3. c. 46. relative to the lottery; *Loyton v. Pearce*, M. 19 G. 3. 15, 16

M.

MAGISTRATE.

VIDE COSTS, No. 7. INFORMATION, No. 4. JUSTICE OF PEACE, MAYOR.

+ MAGNA Charta.

+ *Vide* TABLE of Statutes after title STATUTE.

MAINTENANCE of the Poor.

Vide RELIEF.

MALICIOUS Prosecution.

In an action for a malicious prosecution, the plaintiff must shew in his declaration that the original suit (wherever instituted) is at an end; *Fisher v. Bristow*, T. 19 G. 3. 215

MANDAMUS.

1. "Not duly elected, admitted, and sworn," is not a good return to a *mandamus* to restore; *Rex v. Lyne Regis*, H. 19 G. 3. Page 79 to 86
2. "Not duly elected, admitted, or sworn," perhaps is. 86
3. "Not duly elected" is a good return to a *mandamus* to admit. 80
4. What certainty is required in a return to a *mandamus*. *Vide* CERTAINTY, No. 2.
5. On a *mandamus* to restore to the office of a capital burghess, in a return,—that the cause of amotion was non-attendance at a meeting to which the party was summoned for the election of a capital burghess,—an *averment*, that the right of election is—"in the capital burghesses being in the common council"—does not assist with sufficient certainty that he had a right to concur in the election, because it does not necessarily appear, that all the capital burghesses are of the common council; *Rex v. Lyne Regis*, E. 19 G. 3. 177 to 182
6. A *mandamus* will not lie to compel admission to the degree of *barrister*; *Rex v. Gray's Inn*, E. 20 G. 3. 353 to 357
7. The court will not grant a *mandamus* to the Bank, &c. to transfer stock; *Rex v. The Bank of England*, M. 21 G. 3. 524 to 526
8. *Vide* RETURN, No. 1, 2, 3, 5.

MANOR.

Vide COPYHOLD. CUSTOM, No. 5, 6. EVIDENCE, No. 20. MORTGAGE, No. 15, 16.

MARKET Town.

The inhabitants of a market town, or of a city, borough, or town corporate, are not prohibited by 1 & 2 Ph. & M. c. 7. from selling woollen cloth, &c. in other market towns, cities, &c. by retail, and not in open fair; *Lee v. White*, M. 20 G. 3. 256

MAR.

A Table of the Principal Matters.

MARRIAGE.

1. The actual celebration of a marriage need not be proved in any civil case except in actions for criminal conversation. Page 174
2. What shall be evidence of an actual marriage. *Vide* COPY, No. 1. EVIDENCE, No. 17.
3. A marriage is void if celebrated in a chapel erected since 26 Geo. 2. although marriages may have been frequently celebrated *de facto* there; *Rex v. Northfield*, E. 21 G. 3. 659 to 661
4. But by 21 Geo. 3. c. 53. such marriages, if previous to that act, are made valid, and the clergyman exempted from the penalties of 26 Geo. 2. c. 33. 661, n. [1]
5. Marriage Settlement. *Vide* MORTGAGE, No. 16. POWER, No. 4, 7. † WILL, No. 1, 2, 3, 4, 6, 7, 31.

MARSHALSEA Court.

The *plaint*, not the *capias*, is the commencement of the action in the Marshalsea court; *Ward v. Honeywood*, H. 19 G. 3. 61, 62

MASTER.

1. The Master may tax costs on an agent's bill to his client the attorney in the country. 189, n. 190, n.
2. *Vide* COSTS, No. 10. PARTNER, No. 2.

MASTER of the Rolls,

Vide CASE, No. 3.

MAXIMS applied or explained.

1. *Qui prior est tempore potior est jure.* 23
2. All acts in *pari materia* are to be taken together. 36
3. In pleading, *via trita via tuta.* 60
4. *Communis error facit jus.* 102, n. [1]
5. Legal fictions shall not be contradicted to let in objections of form. 112

6. A third person shall neither suffer nor profit by the fraud of another. Page 229

7. *In pari delicto potior est conditio defendentis.* 255, 468, 470, 695, n. [3] to 698, n.
8. All mercantile contracts ought to be construed liberally. 277
9. Expressions used by the courts are to be understood with relation to the subject matter then before them, 283
10. The intention of a testator must prevail if consistent with law. 322
11. Effect must be given to all the words of a will if possible. 322
12. *Ignorantia juris non excusat.* 471
13. Freight is the mother of wages. 542
14. The safety of the ship is the mother of freight. 542
15. *Quod inconveniens est, non licitum est.* 610
16. *Quod ab initio non valet, tractu temporis non convalescit.* 660
17. Remedial laws are to have a liberal construction. 706
18. Penal laws are to be construed strictly. 706
- † 19. *Volenti non fit injuria.* Instance of the misapplication of that maxim, 697, n. 698, n.
20. *Vide* PLEADING, No. 1.

† MATERIAL.

- † 1. Material facts not disclosed in representing the state of a ship to an under-writer, though without fraud, vacate the insurance; *Shirley v. Wilkinson*, B. K. M. 22 G. 3. 306, n. [† 81]

MAYOR.

Qu. Whether, if a mayor *de facto* intervenes, the mayor of the former year who is returning officer, and is entitled by the charter to hold over till a legal successor is chosen, can be elected the third year, under 9 Ann. c. 20. § 8. 397 to 401

† MEMORANDUM.

- † Special memorandum. *Vide* BILL, No. 1, 4.

MESNB

A Table of the Principal Matters.

MESNE Profits.

Vide BANKRUPT, No. 37. ENTRY,
No. 4. Mortgage, No. 6.

MIDDLESEX.

1. An attorney is not subject to the jurisdiction of the county court of Middlesex; *Wiltshire v. Lloyd*, E. 20 G. 3. Page 381, 382
2. Bill of Middlesex. *Vide* PRACTICE, No. 8.
3. Perjury committed by a witness on a trial before a Middlesex jury at the Old Bailey, is tried by a city jury. 794, 796, 797
4. *Vide* COSTS, No. 5, 6, 11, 12.

MILITIA.

Vide SETTLEMENT, No. 11.

MINE.

Ejectment will lie for a mine. 305

MISRECITAL.

1. If the defendant undertake to set forth the statute of 23 Hen. 6. c. 9. in a plea to an action on a sheriff's bond, a literal misrecital is fatal; *Boyce v. Whitaker*, H. 19 G. 3. 94 to 97
- † 2. On an information under a private statute, a misrecital of the commencement of the parliament is fatal, after verdict, on the plea of not guilty. 97, n. [† 41]
- † 3. But it should seem, that the misrecital of any part of a private statute, can only be taken advantage of by pleading *nil tiel record*. 97, n. [† 41]
- ✧ 4. The introduction of an unmeaning word in the recital of any instrument in a declaration (as of "if" in setting forth the sheriff's precept to the returning officer in an action for bribery) is not a fatal variance; *King v. Pippet*, B. R. E. 26 G. 3. 194, n. [† 41]

5. *Vide* RECITAL. VARIANCE, No. 1, 2.

† MISTAKE.

† *Vide* CONSTRUCTION, No. 4. ERROR, No. 1, 2. INSURANCE, No. 17, 18, 29. JUSTICE of Peace, No. 3.

MODUS.

1. Instances of moduses void in law. Page 204, 205
2. A modus is rateable to the poor. 405
- ✧ 3. *Vide* PROHIBITION, No. 2.

✧ MONEY paid into Court.

✧ *Vide* AGENT, No. 3.

MONTH.

A month in law is a lunar month or 28 days, unless otherwise expressed, 463

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. *Ejectment* will lie by a mortgagee, against a tenant, under a lease from the mortgagor subsequent to the mortgage, without notice to quit; *Keech v. Hall*, M. 19 G. 3. 21 to 23
- ✧ 2. But if there is tenant from year to year, and the landlord mortgages preceding the year, the tenant is entitled to 6 months notice to quit, from the mortgagee, B. R. 21, n. [† 41]
3. The legal interest of a mortgagor in possession, is inferior to that of a mere strict tenant at will. 22, 282, 283
4. But if a mortgagee encourage the tenant, under a lease from the mortgagor, to lay out money, he shall not recover in *ejectment* before the end of the term granted by the mortgagor. 22
5. A tenant, under a lease from the mortgagor prior to the mortgage, shall not set it up against the mortgagee, in *ejectment*, if he has notice that the mortgagee only means to compel

A Table of the Principal Matters.

- compel him to *attorn*; *White v. Hawkins*, B. R. Page 23, n. [7]
6. *Qu.* If *trespass* for *mesne profits* will lie by a mortgagee, against a tenant under a *lease* from the mortgagor, posterior to the mortgage 22, 23
7. A mortgage by *baron* and *feme*, of her estate, is *void*, after the baron's death, and not merely *voidable*, though in the form of a *lease*; *Goodright v. Strathan*, B. R. M. 15 G. 3. 53, n. [17], 54, n.
8. But a re-delivery of the mortgage deed, by the *wife*, after the husband's death, will make it good; *Goodright v. Strathan*, B. R. M. 15 G. 3. 53, n. [17], 54, n.
9. And circumstances may operate as a *virtual re-delivery*; *Goodright v. Strathan*, B. R. M. 15 G. 3. 53, n. [17], 54, n.
10. A mortgagee, after giving notice of the mortgage to the *tenant* in possession under a *lease* prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may *distrain* for it, after such notice; *Moss v. Gallimore*, B. R. M. 20 G. 3. 279 to 283
11. A mortgagor is not entitled to *emblems*, when he is turned out of possession by the mortgagee. 283
12. A mortgagee of a term cannot be sued as *assignee*, till he takes *actual possession*; *Eaton v. Jaques*, M. 21 G. 3. 455 to 461
13. A mortgagor in possession gains a *settlement* by 40 days residence. 632
14. So, it should seem does a mortgagee in possession. 632
15. If a lord of a *manor* mortgage the manor in fee to *A.* and afterwards purchase *copyholds* held of the manor, and take *surrenders* of them to himself in fee, they shall enure to the benefit of the mortgagee; *Doe v. Pott*, T. 21 G. 3. 710 to 722
16. And a *settlement* by the lord of all his estate mortgaged to *A.* shall pass the *equity* of redemption of such surrendered *copyholds*; *Doe v. Pott*, T. 21 G. 3. 710 to 722
17. If a mortgagor *devise* the mortgaged premises, and afterwards pay

off the mortgage, and the mortgagee convey the *legal estate* to a *trustee* in trust for the mortgagor, this change of the *legal estate* shall not operate as a *revocation* of the *will*; *Doe v. Pott*, T. 21 G. 3. Page 710 to 722

18. *Vide SECURITY*, No. 1.

MURDER.

1. On a special *verdict*, *principals* in the second degree cannot be affected, unless the *jury* find expressly, that they were actually present, or that some acts were done by them which unavoidably shew that they were present, or that they were of the same party, on the same pursuit, and under engagements and expectation of mutual defence and support from the person who did the fact; *Rex v. Borthwick*, T. 19 G. 3. 207 to 212
2. If several are *indicted*, *A.* as giving the blow, and the others as present aiding and abetting, *evidence* that one of the others gave the blow, and that *A.* was only present, &c. will support the indictment. 207, n. [8]

MUTINY *Ad.*

1. Instance of a *conviction* under the mutiny act, for not quartering officers, held to be *void* for not stating the *evidence*; *Rex v. Read*, M. 21 G. 3. 486, 487
2. *Vide ARTILLERY*.

N.

NAVIGABLE *River.*

THE right to the soil of a navigable river, belongs, by *presumption* of law, to the *King*, not to the owners of the adjoining land; *Rex v. Smith*, 20 G. 3. 441 to 446

NEGOTIABILITY.

The negotiability of a *bill of exchange* may be restrained by a special *endorsement*

A Table of the Principal Matters.

versment; *Ancher v. the Bank of England*, E. 21 G. 3. Page 637 to 641

NEUTRAL Property.

Vide INSURANCE, No. 41, 50, 51.

NEW Trial.

Vide TRIAL, No. 4, 8. *VENIRE de novo*.

NIL debet.

Instance of what may be given in evidence under the plea of *nil debet*.
Vide JUDGMENT, No. 4.

NIL habuit in tenementis.

Nil habuit in tenementis is the proper plea, where the plaintiff declares on a demise to the defendant, and the defendant means to dispute his title. 620

NIS I Prius.

The authority of the judge at *Nisi Prius* is by the commission of *Affize*. 791

NOLI Prosequi.

1. Where two defendants in *assumpsit* sever in pleading, and one pleads a special plea, which is found for him, the plaintiff may enter a *noli prosequi* as to him, and proceed to final judgment and execution against the other. 169, n. [+56]

2. *Vide* INFORMATION *ex officio*, No. 2.

NON-Pros. NON-Suit.

1. In a joint action the plaintiff cannot be non-pros'd by one or some of the defendants; *Powell v. White*, E. 19 G. 3. 169
2. The insolvency of the defendant happening after the action brought, is good cause against judgment as in case of a nonsuit; *Bailly v. Wilkinson*, E. 21 G. 3. 671
3. Where, in a joint action, there is judgment by default against one defendant, the other cannot non-suit

the plaintiff at the trial. Page 169, n. [+56]

4. Nor obtain judgment as in case of a non-suit in such case (No. 3.), if the plaintiff neglect to go to trial. 169, n. [+56]

5. By judgment of *non-pros*, the plaintiff is out of court as to all the defendants; *Philpot v. Muller*, B. R. E. 23 G. 3. 169, n. [+56]

6. Therefore, if several defendants sever in pleading, one cannot sign judgment of *non-pros* as to himself, and take out execution; *Philpot v. Muller*, B. R. E. 23 G. 3. 169, n. [+56]

7. If judgment is signed in such case (No. 6.), the court will set it aside on motion, in the same term. 196, [+56]

8. But such a motion in a subsequent term is too late, and the redress must be by writ of error; *Philpot v. Muller*, B. R. E. 23 G. 3. 169, [+56]

9. If, on such a judgment, the action being *trespass vi et armis*, the *ca. sa.* sued out is in *trespass on the case*, the court will set aside the execution, even in a subsequent term (the plaintiff undertaking not to bring an *action*), because there is no other remedy; *Philpot v. Muller*, B. R. E. 23 G. 3. 169, [+56]

10. Instances of what shall nonsuit the plaintiff. *Vide* ALLEGATION, No. 3. PLEADING, No. 6, 7; 22. VARIANCE, No. 2, 3, 4, 5, 6, 7, 8, 9.

NON-Residence.

NON-RESIDENCE of Corporators.
Vide CORPORATION, No. 4, 5.

NOTE.

Vide PROMISSORY Note.

NOTICE.

1. A notice to quit, "or I shall insist on double rent," is good to support an *ejectment*; *Doe v. Jackson*, E. 19 G. 3. 175, 176
2. A mortgagee may recover possession against the mortgagor, or a tenant under a lease from the mortgagor posterior

A Table of the Principal Matters.

posterior to the mortgage, without notice to quit; *Keech v. Hall*, M. 19 G. 3. Page 21 to 23

3. Notice of distress. *Vide* DISTRESS, No. 1.

4. Notice of trial. *Vide* TRIAL, No. 1, 2, 3.

5. Instances where a party shall be affected by notice. *Vide* ATTORNEY, No. 11, 12. BILL of Exchange, No. 15, 24. DECREE, No. 1. JUDGMENT, No. 7. POWER, No. 4.

6. Instances where securities shall be void, though in the hands of purchasers for valuable consideration and without notice. *Vide* GAMING, No. 3.

† 7. Instances of what the court will or will not take notice of. *Vide* CUSTOM, No. 10, 11. PARLIAMENT, No. 1, 2. PRIVATE Statute, No. 2.

8. Notice of appeal. *Vide* APPEAL, No. 1.

9. *Vide* INSURANCE, No. 14. MORTGAGE, No. 1, 2, 10.

Nul tiel record.

1. Nul tiel record is no plea to an action on a foreign judgment, and may be rejected as nugatory, although the plaintiff has called the judgment a record in his declaration, and concluded *prout patet per recordum*; *Walker v. Witter*, M. 19 G. 3. 1 to 7

† 2. *Vide* PRIVATE Statute, No. 2.

† NURTURE.

† 1. A bastard living with the mother for nurture, in a parish where she, and not the bastard, is settled, is to be maintained by its own parish; *Simpson v. Johnson*, M. 19 G. 3. 7 to 9

† 2. So it is with regard to legitimate children; *Rex v. Hemlington*, H. 17 G. 3. 9, n. [2], 10, n.

† 3. *Vide* RELIEF, No. 4, 5.

O.

† OATH.

† *Vide* AFFIDAVIT. INFORMATION, No. 2, 3. PERJURY.

OCCUPANCY.

Vide POOR-Rate, No. 8.

OFFICE.

1. If two offices are incompatible, the acceptance of the higher, *ipso facto*, vacates the other; *Rex v. Bliffel*, B. R. E. 19 G. 3. Page 398, n. [22]
- † 2. But *Quere*, for it has been since held, that the subsequent acceptance of one (whether of a higher nature or not) vacates a former incompatible office; *Milward v. Thatcher*, B. R. M. 28 G. 3. 378, n. [15]

OFFICER.

1. Officers of the forest, in the army, and others belonging to the King, are exempted from serving on juries. 190
2. Sheriff's officer. *Vide* PLEADING, No. 22. SHERIFF.

OLD Bailey.

Perjury committed at the Old Bailey, on a trial before a Middlesex jury, is laid in, and tried by a jury of, the city of London. 794, 796, 797

OPINION.

Instance where evidence of opinion is not admissible; *Syers v. Bridge*, M. 21 G. 3. 527 to 531

OPTION.

1. When one of two things is to be performed, the option is in the person who is to perform; *Layton v. Pearce*, M. 19 G. 3. 15, 16
- † 2. Observation on that case. 15, n. (5) [15]
3. Upon

A Table of the Principal Matters.

3. Upon an optional agreement, if one part of the alternative is prohibited and subject to a penalty, the party having made his option for that part shall incur the penalty; *Layton v. Pearce*, M. 19 G. 3. Page 15, 16
4. *Vide* ASSIGNEE, No. 8.

ORDER.

1. Orders of *justices* are to have every intendment in their favour. 116, 117
2. Difference, in that respect, between orders and *convictions*. 116, 117, 663
3. *Vide* ASSUMPSIT, No. 5. BANKRUPT, No. 32, 33, 34. BASTARD, No. 3, 4. REMOVAL of *Paupers*, No. 1.

ORDERS.

Tale for holy orders. *Vide* TITLE.

ORDNANCE.

Vide ARTILLERY.

ORIGINAL.

Vide ATTORNEY, No. 9. † *CAPIAS*, No. 3. EXCHEQUER Chamber, No. 3. OYER, No. 1.

OVERSEER.

1. The appointment of overseers for the sub-divisions of a parish is void, unless it expressly appear, that the parish could not reap the benefit of 43 *El. c. 2.*; *Rex v. Uttoxeter*, E. 20 G. 3. 346 to 350
2. More than four overseers cannot be appointed under 43 *Eliz. c. 2.* 349, & n. [2]
3. If an overseer alter the *poor-rate* after it has been allowed, but with the approbation of the *justices*, and deny criminal motives, the court will not grant an *information* against him; *Rex v. Barrat*, M. 21 G. 3. 465, 466
4. *Vide* POOR-RATE, No. 2, 14.

OXFORD.

1. A college barber at Oxford, though

- he resides in the city out of the college, is entitled to the *privileges* of the university; *Rex v. Routledge*, M. 21 G. 3. Page 531 to 538
2. *Qu.* Whether under that right he is exempt from serving the office of *constable* for the city; *Rex v. Routledge*, M. 21 G. 3. 531 to 538

OYER.

1. A defendant is not entitled to oyer of the *original*, and if he crave oyer thereof, the plaintiff may proceed without taking any notice of it; *Boats v. Edwards*, T. 19 G. 3. 227, 228
2. This is also the rule in the court of *Common Pleas*. 228, & n. (a)
3. If oyer is granted of any instrument or record, and it is set forth, although the party was not entitled to such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's *plea*; *Jeffery v. White*, M. 21 G. 3. 476, 477
4. Oyer cannot be compelled of an *Act of Parliament*. 477
5. Nor of *Letters Patent*; *Rex v. Amery*, H. 26 G. 3. 477, n. [C]

P.

PANNAGE.

VIDE HERBAGE and Pannage.

PAPIST.

Vide EVIDENCE, No. 22.

PARLIAMENT.

- † 1. The court is bound to take notice of the commencement, prorogations and sessions of parliament, 97, n. [† 41]
- † 2. And that (No. 1.) even when the proceedings are on a *private statute*. 97, n. [† 41]
3. If a *libel* charge a member with criminal language held in parliament, the

A Table of the Principal Matters.

the court will grant an information, without a denial of the charge by affidavit. Page 387, 388.

4. Copies of entries in the journals of parliament are evidence; *Reu v. Lord George Gordon*, H. 21 G. 3. 590 to 593, & n. [3], 594, n.

PARTNER.

1. To make a person liable as a partner, there must either be a contract between him and the ostensible person, to share in the profit and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable; *Howe v. Dawes*, E. 20 G. 3. 371 to 373.
2. If, on an execution against one of two partners, the partnership effects are taken and sold, the court will order the sheriff to pay over to the other, a share of the produce proportioned to his share in the partnership effects, to be ascertained by the Master; *Eddie v. Davidson*, E. 21 G. 3. 650, 651.
- † 3. *Vide* BILL of Exchange, No. 21.

PEACE-Officer.

A peace-officer is not liable to an action for arresting a party on a reasonable charge of felony, without a warrant, although it shall afterwards appear that no felony has been committed; but a private person is; *Samuel v. Payne*, E. 20 G. 3. 359, 360, & n. [7], n. [8].

P E E R.

Vide ACTION, No. 8. BAIL, No. 1.

PENAL Action.

1. A discontinuance in a penal action is cured by verdict, under 32 Hen. 8. c. 30. 115.
2. *Vide* AMENDMENT, No. 8. LIMITATION of Actions, No. 1.

PENAL Statute.

Vide MAXIMS, No. 18.

PENALTY.

Vide EXCISE, No. 1, 2. FISHERY, No. 2. MARRIAGE, No. 4. OPTION, No. 3.

PENALTY of a Bond.

Vide ANNUITY, No. 4, 5. BOND, No. 1.

PERJURY.

- † 1. It is necessary in indictments for this offence to state a legal authority to administer an oath. Page 156.
2. Where perjury is to be laid, and tried, when committed locally within a county corporate, on the trial of a cause before a jury of the county at large. *Vide* GLOUCESTER. Old Bailey.
- † 3. Statute of frauds and perjuries. *Vide* TABLE of Statutes after title STATUTE.

PERSONAL Property.

A conveyance in trust of a devise of personal property, to one and the heirs of his body, vests the whole interest. 505, n. 506, n.

PERSONAL Representative.

Vide ADMINISTRATION. EXECUTOR.

† PETITION of Rights.

† *Vide* TABLE of Statutes after title STATUTE.

P L A I N T.

Vide MARSHALSEA Court.

P L A N T A T I O N S.

Vide ADMIRALTY, No. 1. BANKRUPTCY, No. 21. JAMAICA.

P L A Y.

Vide GAMING.

P L E A

A Table of the Principal Matters.

PLEA PLEADED.

1. The time of plea pleaded is to be reckoned from the date of the entry of the plea on the record, not from the time of its being delivered to the plaintiff; *Sullivan v. Montague*, H. 19 G. 3. Page 109 to 113
2. A judgment obtained by a defendant against the plaintiff after the declaration delivered, and before plea pleaded, may be pleaded as a set-off; *Reynolds v. Beerling*, B. R. M. 25 G. 3. 112, n. [† 47]
3. And that although it do not appear that the cause of action on which the defendant's judgment was obtained, arose prior to the commencement of the plaintiff's action; *Reynolds v. Beerling*, B. R. M. 25 G. 3. 112, n. [† 47]
4. But that point has been since over-ruled; *Evans v. Proffers*, B. R. E. 29 G. 3. 112, 113, n. [† 47]

PLEADING.

1. Two affirmatives cannot make an issue. 60
2. Whenever new matter is introduced, the plea, &c. must conclude with a verification. 60
3. Matter of defence happening after the action brought, if before plea pleaded (*Vide PLEA pleaded*), may be pleaded in bar; *Sullivan v. Montague*, H. 19 G. 3. 109 to 113
4. But *Qu.* as to that point; *Evans v. Proffers*, B. R. E. 29 G. 3. 112, 113, n. [† 47]
5. The prosecutor may reply to a return to a mandamus. 159
6. On a declaration that all an original lessee's estate came to the defendant by assignment, and a plea that all, &c. did not come, &c. *modo & forma*, and issue joined, evidence of an underlease will not support the issue; *Holford v. Hatch*, E. 19 G. 3. 183 to 187
7. Nor will evidence of an assignment of all the original lessee's estate in part of the demised premises; *Hare v. Cator*, B. R. E. 18 G. 3. 183, n. [†], 184, & n. [21]

8. *Attornment*, since the statute of 4 Ann. c. 16. § 9. need not be averred, in a declaration in covenant for rent. Page 293
9. Nor in an *avowry*. 283
10. In *trespass* for a tortious distress for rent, by 11 G. 2. c. 19. § 21. the special matter may be given in evidence on a plea of the general issue. 283
11. A justice of peace, constable, &c. being sued for what he has done by virtue or reason of his office, may plead the general issue, and give the special matter in evidence. 307
12. *Qu.* Whether, wherever a defendant is permitted by statute to give the special matter in evidence under the general issue, the plaintiff is not also entitled to give every thing in evidence, which may rebut the special defence. 163
13. In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence thereof, the plaintiff may traverse the usurious agreement, and conclude with a verification; *Smith v. Dovers*, T. 20 G. 3. 428 to 431
14. When the whole of the plea is denied in the replication, the conclusion ought to be to the country; but, if a particular allegation is selected and denied, the conclusion ought to be a verification. 430
15. If a personal representative pleads *plene administravit prater* a certain sum, and, afterwards, to another action brought in the same term, *plene administravit prater* the same sum, and, as to that sum, states, that he had confessed it in the other action, this is a good bar; *Waters v. Ogden*, M. 21 G. 3. 452 to 455
16. In covenant for rent, against the defendant as assignee of all the lessee's interest, &c. by virtue whereof he became, and still is possessed, &c. if the defendant plead, that all, &c. did not come to him by assignment, and that he did not become possessed, &c. it is good evidence to support the plea that the assignment was by way of mortgage, with a clause of redemption. E c

A Table of the Principal Matters.

tion, and that the defendant has never taken actual possession, and this, although the mortgage is forfeited; *Eaton v. Jaques*, M. 21 G. 3.

Page 455 to 461

17. But, if the defendant plead an assignment over before the rent accrued, it will not be a good replication, that the assignee over never took actual possession, without adding, that the assignment over was by way of mortgage; *Walker v. Reeves*, B. R. M. 22 G. 3. 461, n. [1], to 463, n.

18. Or that it was collusive and fraudulent; *Walker v. Reeves*, B. R. M. 22 G. 3. 461, n. [1], to 463, n.

19. Nor is it a good replication in such case (No. 26.) that the assignee over was a *feme covert*; *Barnfather v. Jordan*, M. 21 G. 3. 452

20. In declaring on a deed (as in covenant), it is only necessary to state enough of the deed to show a title to the action. 667

21. And that part need not be set forth in *hæc verba*, but only according to the legal effect or operation. 667, 767

22. In debt by an informer against a sheriff's officer, if the declaration state a judgment, and *fi. fa.* upon that judgment, both must be proved, although it might be unnecessary to have stated the judgment. 668, & n. [1]

23. *Vide* BANKRUPT, No. 17. CERTAINTY, No. 4. MISRECITAL. OYER, No. 3. SOLVIT *post* diem. VARIANCE.

PLENE *administravit prater.*

Vide PLEADING, No. 15.

POLICY of Insurance.

1. The ancient form which is still retained, is in itself very inaccurate, but has been reduced to certainty, by length of time, and a variety of discussion and decisions. 270

2. *Vide* INSURANCE.

POOR.

Vide POOR-RATE. RELIEF. SETTLEMENT.

POOR-Rate.

1. A rate cannot be made for repairing or re-building a work-house; *Rex v. Warrell*, E. 29 G. 3. Page 116 to 118

2. Nor to re-imburse an overseer for money advanced for the parish. 117, 118

3. If a rate appear to be illegal by the title, the court will quash it, though no special case has been stated; *Rex v. Warrell*, E. 19 G. 3. 116 to 118

4. *Qu.* Whether the herbage and pannage of a forest are rateable to the poor. 302 to 305

5. The ranger of a royal park is not rateable for herbage and pannage; *Lord Bute v. Grindall*, B. R. T. 26 G. 3. 305, n. [d 13]

6. Uncertainty in the value of property, is not a reason against its rateability. 303, 304

7. Nor the tenure under which it is occupied; whether in fee, for life, years, or by a keeper, or servant, in lieu of salary or wages. 304

8. Property which does not lie in occupancy according to the strict common law sense of the word, may be rateable. 304

9. *Lot and cope* in the mines of Derbyshire are rateable; *Roevills v. Gell*, B. R. E. 16 G. 3. 304, & n. [1]

10. Tolls are rateable. 305, & n. [2]

11. The parochial assessments for the vicar of St. Michael's in Coventry established by 19 G. 3. c. 60. are not rateable; *Rex v. Toms*, E. 20 G. 3. 401 to 406

12. But those for the vicar of the Trinity in the same place, established by 19 Geo. 3. c. 57. are; *Rann v. Pickin*, B. R. T. 22 G. 3. 406, n. [1]

13. A *modus* for tithes is rateable. 405

14. If a landlord tender the rate for his tenant, the overseer ought to receive it, and a warrant ought not to be granted to disfranchise the tenant; *Rex v. Coker*, T. 20 G. 3. 426 to 428

15. Whether houses shall be rated in a different proportion from land must depend on local circumstances, and the court

A Table of the Principal Matters.

- court will not quash an order for rating them equally; *Rex v. Swanage*, H. 21 G. 3. Page 562, 563
16. If any error in a rate affects the proportion payable by every person rated, the rate must be quashed in toto. 563
17. Settlement by rating. *Vide* SETTLEMENT, No. 6, 7, 16, 17.

POWER.

1. A lease to commence from the day of the date is good; under a power to grant leases in possession only, and not in reversion; *Fugh v. The Duke of Leeds*, B. R. M. 18 G. 3. 53. n. [15]
2. Though a tenant for life with power to grant leases in possession for twenty-one years convey his life-estate to pay an annuity for his life, and the surplus to himself, he may still grant leases agreeable to the terms of the power; *Renn v. Bulkeley*, M. 20 G. 3. 292, 293
3. Powers are to be construed in the same manner in a court of law as in equity. 293
4. An estate being conveyed, by a marriage-settlement, to trustees to the use of the settlor (the husband) for life, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate for his own life for valuable consideration, in the settled estate, a revocation subsequent thereto of all the uses, executed by him with the consent of the trustees, and a conveyance of the estate, to a purchaser for valuable consideration also, but with notice of the prior grant for the settlor's life, shall not affect the interest granted for his life; *Goodright v. Cator*, M. 21 G. 3. 477 to 486
5. Where tenant for life has a power to grant leases "in possession, but not by way of reversion or future interest," a lease per verba de presenti is not contrary to the power, though the estate at the time of making the lease was held by tenants at will or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee; *Goodtitle v. Funucan*, H. 21 G. 3. Page 565 to 575
6. Under a power—"to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same"—such parts of the estates enumerated in the power as have never been demised may be let; *Goodtitle v. Funucan*, H. 21 G. 3. 565 to 569
7. But, in a family settlement, of an estate consisting of some ground always occupied with the family seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. 574
8. Where a qualification annexed to a power goes in destruction of the power, the law will dispense with the qualification. 574
9. *Qy.* If a lease under a power, by which the lessor must reserve the old rent, would be a fraud on the power and void, although the old rent were reserved, if the covenants in the new lease were less advantageous to the reversioner than those in the former leases; *Goodtitle v. Funucan*, H. 21 G. 3. 565 to 575
10. *Vide* COVENANT, No. 3. WILL, No. 31.

† POWYS'S MS.

† *Vide* the TABLE of Statutes after this STATUTE.

PRACTICE.

1. On a rule to return the paper-book on a particular day, it must be returned some time in that day, otherwise the other party may sign judgment, without waiting till the opening of the office the morning following; *Hafelar v. Ansell*, T. 19 G. 3. 197
2. When a cause has been suspended a year after it was at issue, the defend-

A Table of the Principal Matters.

- ant is entitled to a term's notice of trial. - Page 71, & n. [6]
3. But not when he himself has suspended the cause by an *injunction*; *Hayley v. Riley*, H. 19 G. 3. 71, 72
4. The court will grant a *new trial* under particular circumstances, after the four days are elapsed; *Birt v. Barlow*, E. 19 G. 3. - 171
5. And at any time before judgment; *Rex v. Gough*, T. 21 G. 3. 797, 798
6. The court will order a *warrant to confess judgment* to be delivered up, if obtained by *fraud*, before any use has been made of it; *Duncan v. Thomas*, T. 19 G. 3. - 196
7. On notice to execute a *writ of enquiry* at a certain hour, the party is not tied down to the precise time fixed by the notice; *Williams v. Frith*, T. 19 G. 3. - 198
8. If a party is *arrested* by bill of *Middlesex* out of that county, the proceedings will be set aside for *irregularity*; *Devenège v. Dalby*, E. 20 G. 3. - 384
9. When a party against whom an *attachment* is prayed, positively denies the charge by *affidavit*, the court of *King's Bench* always refuses the attachment, without entering into the merits or the credit of the parties. 516
10. The court of *Chancery* in such cases (No. 9.) goes into the truth of the charge. - 516
11. On a *plea of coverture*, and *verdict* for the defendant, the *husband* cannot have execution for the *costs*, without a *sci. fa.*; *Wortley v. Rayner*, E. 21 G. 3. - 637
12. A motion may be made in arrest of judgment, after a rule for a *new trial* has been discharged, and at any time before the judgment is entered; *Taylor v. Whitehead*, T. 21 G. 3. 745, 746
13. *Vide AGENT*, No. 3. LATITAT, No. 1.

PREMIUM.

Vide INSURANCE, No. 20, 21, 37, 42, 43, 44, 45, 46, 47, 48, 49.

† PRESCRIPTION.

† *Vide EXEMPTION*, No. 1. INDICTMENT, No. 7. *QUE ESTATE*.

† PRESENT aiding and abetting.

† *Vide MURDER*, No. 1, 2.

PRESUMPTION of Law.

1. Where a plaintiff has stated his title defectively or inaccurately, it is presumed, after *verdict*, that all circumstances necessary to support his *action* were proved. - Page 683
2. *Vide ASSUMPSIT*, No. 6. IMPLICATION, No. 1. INSURANCE, No. 39. MORTGAGE, No. 9. ORDER, No. 1, 2. REMAINDER, No. 1, 2. RETURN, No. 4, 5. VERDICT, No. 4, 5.

PRINCIPAL in the second Degree.

Vide MURDER.

PRINCIPAL and Agents.

Vide AGENT, No. 2. ATTORNEY, No. 23. SHERIFF, No. 1, 2.

PRINCIPAL and Surety.

Vide BANKRUPT, No. 7, 13, 14, 15, 16, 17.

† PRIVATE Statute.

- † 1. The court are bound to take notice of the commencement, prorogations, and sessions, of *parliament*, even when the proceedings are on a private statute. - 97, n. [† 41]
- † 2. It should seem, however, that the court will not take notice of *misfranchises* of private statutes in other respects, unless *nul tiel* record is pleaded. 97, & n. [12], n. [† 41]
- † 3. *Vide PUBLIC Statute*.

PRIVATEER.

When there is a joint capture by several privateers, they are to share in pro-

A Table of the Principal Matters.

proportion to the number of men in each; *Roberts v. Hartley*, H. 20 G. 3. - Page 311, 312

PROBABLE Cause of seizure. *Vide* APPEAL, No. 5.

PRIVILEGE.

Vide ATTORNEY, No. 13, 14, 15, 16, 17, 22. BAIL, No. 1. BILL of Exchange, No. 11. OXFORD.

PRIVITY.

Difference between privity of estate and privity of contract. 462, n. 765, 766

PRIZE.

1. A captain of *marines* who happens to be on board a man of war when she takes a prize, but does not belong to her complement, shares only as a *passenger*; *Wemys v. Linzee*, H. 20 G. 3. - 324 to 328
2. The regulation of the distribution of prizes by *statute* and proclamation. 325
3. All questions of prize at sea, belong exclusively to the jurisdiction of the *Admiralty*; *Le Caux v. Eden*, H. 21 G. 3. 594 to 613, 613, n. [1] to 620, n.
4. The *Admiralty* court may give reparation in *damages* for personal injuries received on occasion of a capture as prize; *Le Caux v. Eden*, H. 21 G. 3. - 594 to 613
5. When a capture is made at land by the assistance of a fleet, all questions concerning the property captured belong exclusively to the jurisdiction of the *Admiralty* court; *Lindo v. Rodney*, B. R. H. 22 G. 3. 613, n. [1] to 620, n.
6. The common jurisdiction of the *Admiralty* is limited to things done *super altum mare*. - 608
7. But, in matters of prize, the jurisdiction depends not on locality, but on the subject matter, which is governed by the *jus belli*, and not by the rules of the common law. 608
8. *Vide* PRIVATEER. RANSOM, No. 6.

PROBATE.

Probate is necessary before a will of personal property, of a *feme covert*, authorized by a power, can be given in evidence; *Stone v. Forsyth*, T. 21 G. 3. - Page 707 to 709

PROCESS.

Vide DISTRESS. EXECUTION. EXTENT. LATITAT. ORIGINAL. PLAINT. PRACTICE, No. 8.

PROCTOR.

1. A proctor cannot sue in the *spiritual* court for his fees; *Pearson v. Campion*, E. 21 G. 3. 629
2. *Vide* PROHIBITION, No. 3.

PROFERT.

Vide ADMINISTRATION, No. 3.

PROHIBITION.

1. A prohibition does not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings; *Blaquiere v. Hawkins*, E. 20 G. 3. 378 to 380
2. If the defence stated on the proceedings below is such, as, if true, ousts the inferior court of its jurisdiction (as where the party sets up a *modus* in answer to a suit for *tithes*), although there has been an interlocutory sentence against the defendant, and, on an appeal, that sentence has been confirmed, and costs awarded, the party sued may have a prohibition both to the original court, and to the court of appeal, to stay execution for the costs; *Darby v. Cosens*, B. R. H. 27 G. 3. 378, n. [90]
3. The court will grant a prohibition, if a proctor or other officer of the *spiritual* court sue there for his fee; *Pearson v. Campion*, E. 21 G. 3. 629
4. The

A Table of the Principal Matters.

4. The court will not put the party to declare in prohibition, if they are clearly of opinion against granting the prohibition, because the same application may be made to the other courts; *Lindo v. Rodney*, B. R. H. 12 G. 3. Page 620

PROMISSORY Notes.

1. *Qy.* If the drawer of a promissory note is entitled to days of grace. 63 & n. [2]
2. *Vide* ACKNOWLEDGMENT, No. 3.
BILL of Exchange. DAMAGES, No. 6.

PROUT *patet per recordum.*

Vide JUDGMENT, No. 6.

+ PROVEABLE.

- † 1. Cases of debts which are proveable under a commission of bankrupt, and therefore discharged by the certificate. *Vide* BANKRUPT, No. 2. 11, 15, 16, 19.
† 2. Debts not proveable. *Vide* BANKRUPT, No. 13, 14, 18, 20.

PROVISIO.

✠ *Vide* LEASE, No. 5, 8, 9, 15.

PUBLIC Statute.

- ✠ 1. The statute of 23 H. 6. c. 9, is a public act, and need not be pleaded; *Samuel v. Evans*, B. R. T. 28 G. 3. 97, n. [12]
✠ 2. And if set forth, a *misrecital*, without a plea of nul tiel record, is fatal; *Boyce v. Whitaker*, 97, & n.
✠ 3. S. P. (No. 2) as to the statute of *Scandalum Magnatum*, 2 Ric. 2. c. 5. 97, n. [13]
✠ 4. *Qy.* Whether the same act may not be public as to some, and private as to other clauses; *Rex v. London*, T. 3 W. & M. 97, n. [12]

PURCHASE.

Vide DEVISE, No. 1. HEIRS, No. 3.

"PURPORT."

The sense of the word "purporting" in an indictment; *Rex v. Jones*, M. 20 G. 3. Page 300 to 302

Q.

+ QUALIFICATION of a Power.

+ *Vide* POWER, No. 8.

QUARTER Sessions.

Vide APPEAL, No. 1, 2. BASTARD, No. 3. RELIEF, No. 4, 5.

QUE Estate.

A copyholder cannot prescribe in a *que estate*. 713

+ QUIA Emptores.

† The statute of *Quia Emptores*, *Vide* the TABLE of Statutes after title STATUTE.

QUI TAM Actions.

Vide AMENDMENT, No. 8. EXCHAMBER, No. 3. LIMITATION of Actions, No. 1.

QUI TAM Informations.

Vide INFORMATION, No. 1.

QUO WARRANTO.

Vide CORPORATION, No. 8.

R.

RANSOM.

1. AN enemy's ship which has ransomed a British vessel, being re-taken with the *hostage* and ransom bill

A Table of the Principal Matters.

bill on board, but the bill being se-
creted, and not delivered up to the
recaptor, the original captor may
recover in an action of *assumpsit* on
the ransom bill; *Cornu v. Blackburne*,
E. 21 G. 3. Page 641 to 644

2. And it has been held to be no ob-
jection (at least on the plea of *non*
assumpsit) that the plaintiff is an
alien enemy; *Cornu v. Blackburne*,
E. 21 G. 3. 641 to 644

† 3. But that point (No. 2.) was
afterwards otherwise determined;
Fisher v. Amban, Cam. Scacc. M. 25
G. 3. 650, n. [† 132]

4. The death of the *hostage* does not
discharge the contract. 644

5. *Qu.* If the captor, being called upon
by the recaptor to deliver up all the
ransom bills he has on board, tells
him that he has done so, and yet
secretes one, whether an action can
be maintained upon it. 649, n. [1],
650, n.

6. *Qu.* If contracts of ransom do not
belong exclusively to the jurisdiction
of the court of *Admiralty*, as arising
out of *prize*, and governable by the
jus belli. 649, n. [1], 650, n.

7. The ransom of *British* ships or goods
taken by the *enemy* is made void and
prohibited under a penalty of 500 l.
by 22 Geo. 3. c. 25. 650, n.

R A T E.

1. Rate for repairing a *highway*. *Vide*
HIGHWAY, No. 1.

2. Rate for the relief of the *poor*. *Vide*
POOR-RATE.

R A T E A B I L I T Y.

Vide POOR-RATE, No. 4, 5, 6, 7, 8,
10, 11, 12, 13.

R E A D E R S H I P.

Qu. Whether a reader-ship is an eccle-
siastical preferment. *Vide TITLE*,
No. 6.

R E A S S U R A N C E.

✧ *Vide INSURANCE*, No. 38.

R E B U T.

1. Parole evidence may rebut a *resulting*
use, or *equity*. Page 26, 39

2. *Vide PLEADING*, No. 12. *WILL*,
No. 1.

R E C I T A L.

1. The word "*asorefaid*" implies, and
binds the party to, an exact recital. 97

2. So does the word "*tenor*." 194

3. But the words "*in manner and form*
following, that it is to say" do not;
Rex v. May, E. 29 G. 3. 193, 194

4. *Vide MISRECITAL*.

† R E C O R D.

† *Vide ALLEGATION*, No. 4. *COPY*,
No. 5. *JOURNALS*, No. 2. *TRAN-*
SCRIPT.

R E C O R D E R of London.

Vide ATTACHMENT, No. 2, 3. *CUS-*
TOM, No. 10, 11,

R E G I S T E R.

1. A register of the *spiritual court* can-
not sue there for his fees; *Pearson v.*
Campion, E. 21 G. 3. 629

2. *Parish register*. *Vide COPY*, No. 1,
EVIDENCE, No. 17.

† R E J O I N D E R.

† *Vide BILL*, No. 3, 5.

R E L E A S E.

1. A release executed by an interested
party, makes him a competent *wit-*
ness, though the releasee refuse to
accept it; *Goodtitle v. Welford, E.*
19 G. 3. 139 to 141

2. If a defendant who is sued by a
landlord in the name of his *tenant*
procure a release from the nominal
plaintiff, the court will order the
release to be delivered up, and per-
mit the landlord to proceed in the

E c 4 action;

A Table of the Principal Matters.

action; *Payne v. Rogers*, E. 20 G. 3.
Page 407

RELIEF.

1. *Qu.* How the parish to which a child belongs, but which lives with its mother for nurture in another, can be compelled to furnish money for its maintenance. - 10, n.
2. *Qu.* Whether a person who applies to the parish for relief for one of his children, but not for himself, is entitled to such relief though he refuse to go into the work-house. 331 to 333
3. It is now determined that he is; *Rex v. Haigh*, E. 30 G. 3. 332, n. [C]
4. *Qu.* Whether the court of quarter sessions can make an original order of maintenance. - 333, n. [1]
5. No appeal lies to the quarter sessions from an original order of relief by a justice of peace; *Rex v. North Shields*, H. 20 G. 3. - 331 to 333

+ RELIEF in Equity.

+ *Vide* EQUITY, No. 4, 5. LEASE, No. 2.

REMAINDER.

1. There may be cross remainders by implication between more than two; *Doe v. Burville*, B. R. E. 13 G. 3. *Wright v. Lord Cadogan*, B. R. E. 14 G. 3. *Perry v. White*, B. R. E. 18 G. 3. *Phippard v. Mansfield*, B. R. E. 18 G. 3. 53, n. [16]
2. But the presumption is against them, when between more than two; *Doe v. Burville*, B. R. E. 13 G. 3. *Wright v. Lord Cadogan*, B. R. E. 14 G. 3. *Perry v. White*, B. R. E. 18 G. 3. *Phippard v. Mansfield*, B. R. E. 18 G. 3. 53, n. [16]
3. Wherever there is a previous freehold sufficient to support the limitation over as remainders, they shall never be construed to be executory devises. - 265, 508, 758
4. An event subsequent to a will may make that limitation an executory de-

vise which, on another event, would have been a remainder. Page 340, 509

5. An executory devise, upon the vesting of a prior executory devise in possession, may become a remainder; *Doe v. Bonnaireau*, M. 21 G. 3. 487 to 509
6. When a remainder is limited after a remainder in fee, both must be contingent. - 504, n. 505, n. 757
7. Definitions of a remainder. 753, 756, 755, n. [1], 756, n.
8. The different classes of remainders. 504, n. 505, n.
9. *Vide* WILL, No. 36.

REMOVAL of Corporators.

Vide CORPORATION, No. 1, 2, 3, 4, 5, 6.

REMOVAL of Paupers.

1. Instances of informal adjudications of the settlement, in orders of removal, which have been held sufficient. 663
2. *Vide* SETTLEMENT.

RENT.

1. Rent cannot be sued for in the court of conscience in the city of London. 245
2. Nor in the court of requests of the Tower Hamlets. - 245
3. *Vide* COVENANT, No. 4, 5. DISTRESS, No. 1, 2, 4. FEE-FARM, FEME COVERT, No. 2. LEASE, No. 10, 11. SHERIFF, No. 6. VARIANCE, No. 7, 8, 9.

REPAIRS.

1. Repairs of a ship done in England, on the captain's credit, do not give him a lien on the ship; *Wilkins v. Carmichael*, H. 19 G. 3. 101 to 105
2. He to whom the use of a thing is granted, is bound to repair it, unless there is a stipulation to the contrary. 748

REPLEADER.

Qu. If a replader is ever granted when the

A Table of the Principal Matters.

the issue is found against the party tendering it. Page 396, 747, 749

REPLEVIN.

Vide COSTS, No. 17, 18. PLEADING, No. 9.

REPLICATION.

Vide BAIL, No. 13. BILL, No. 3.
5. BOND, No. 3. CERTAINTY, No. 2. CORPORATION, No. 3.
PLEADING, No. 14, 17, 18, 19.

REPRESENTATION in Policies of Insurance.

Vide INSURANCE, No. 2, 3, 4, 17, 18, 25, 27, 28, 29.

REPRESENTATION, REPRESENTATIVE.

Vide ADMINISTRATION, EXECUTOR.

REPUBLICATION.

Vide WILL, No. 2, 7, 8, 34.

REQUESTS.

The court of requests in the Tower Hamlets. *Vide* COURT, No. 6.

† RESIDENCE.

1. Upon what property a residence of 40 days gains a settlement. *Vide* SETTLEMENT, No. 20, 21, 22, † 23, 26, 28, 29.
2. Upon what property such residence does not gain a settlement. *Vide* SETTLEMENT, No. 18, 19, 20, † 27.
- † 3. Residence of Corporators. *Vide* CORPORATION, No. 4, 5.

RESULTING Use.

Vide FINE, No. 1. REBUT,

RETURN.

1. *Suppressio veri* is a good cause of action in a return to a *mandamus*. Page 158
2. So if the return is false in substance, though true in words, an action will lie. 159
3. The prosecutor may reply to a return. 159
4. *Presumption* and *intendment* ought to be against returns to writs of *habeas corpus*. 153, 154
5. But in favour of returns to *mandamuses*. 159
6. *Vide* AMENDMENT, No. 10. MANDAMUS, No. 1, 2, 3, 4, 5.

RETURN of PREMIUM.

Vide INSURANCE, No. 20, 21, 41, 42, 43, 44, 45, 46, 47, 48.

RETURNING Officer.

Vide MAYOR, MISRECITAL, No. 4.

REVERSION.

Leases in reversion. *Vide* POWER, No. 1, 5.

REVOCATION.

Vide MORTGAGE, No. 17. POWER, No. 4. WILL, No. 1, 2, 3, 4, 6, 7, 17, 33.

† RIGHTS.

- † 1. Bill of Rights. *Vide* TABLE of Statutes after title STATUTE.
- † 2. Petition of Rights. *Vide* TABLE of Statutes after title STATUTE.

R I O T.

1. If persons riotously assembled, in part demolish a dwelling house, and, at the same time, destroy goods and furniture in the house, although the jury should find that such goods and furniture were not destroyed "by

A Table of the Principal Matters.

- "by means," or "in consequence," of the demolishing of the house, the *Hundred* is liable, under 1 Geo. 1. *ft.* 2. c. 5. § 6. to yield damages for the destruction of the goods and furniture, as well as of the house; *Hyde v. Cogan*, H. 21 G. 3. Page 699 to 707
2. So, if the rioters in demolishing the house, do damage to the garden, the *Hundred* shall yield damages for the garden; *Wilnot v. Horton*, C. B. E. 21 G. 3. 701, n. [3], to 704, n.
3. *Qu.* If an action will lie on the riot act against the *Hundred*, beyond a year from the time when the damage was done. - 700, n. [1]
4. A prosecution for the felony under that act, must be commenced within the year. - 700, n. [1]
5. *Qu.* If twelve or more must be engaged in the demolishing a house, to entitle the party to an action against the *Hundred*. - 700, n. [1]
6. The number of twelve is not necessary to constitute a felony under the act. - 700, n. [2]

R I S K.

Vide INSURANCE, No. 15, 42, 43, 44, 46, 48, 49, 50.

R I V E R.

Vide NAVIGABLE River. WAY, No. 2.

R O B B E R, R O B B E R Y.

Vide HUE and Cry. HUNDRED, No. 2.

† R O L L of Attorneys.

Vide ATTORNEY, No. 1, 2.

R O L L S.

Master of the Rolls. *Vide* CASE, No. 3.

R O M A N Catholic.

Vide EVIDENCE, No. 20.

R U L E S.

Vide CONSTRUCTION. INFORMA-

TION, No. 1, 2. MAXIMS. VERDICT, No. 2.

S.

S A L V A G E.

Vide INSURANCE, No. 12.

S C A N D A L U M *Magnatum*.

Vide EXCHEQUER Chamber, No. 6.

S C I R E Facias.

Vide HUSBAND, No. 3. VERIFICATION, No. 1.

S C O T L A N D.

Creditors in Scotland of a bankrupt here will not be permitted to come in under the commission, unless they will abandon the priority they may have obtained against effects of the bankrupt in Scotland. - Page 170

" S E A M E N."

Sense of the word "seamen," in a policy of insurance; *Bean v. Stupart*, M. 19 G. 3. - 11 to 14

S E C U R I T Y.

1. If a person has two securities, as a mortgage and bond, he may proceed on both, viz. for a foreclosure of the mortgage, and in an action on the bond, at the same time; *Burnell v. Martin*, T. 20 G. 3. 417, 418
2. *Vide* BANKRUPT, No. 4, 5, 6, 7, 13, 14, 15, 18. GAMING, No. 1, 2. USURY, No. 4.

S E N T E N C E.

Vide ADMIRALTY, No. 1, 3.

S E R V I C E.

1. Settlement by hiring and service. *Vide* SETTLEMENT.

A Table of the Principal Matters.

SETTLEMENT, No. 8, 9, 10, 11, 12, 13, 14, 15, 24.

† What will not be good service on the *sheriff or under-sheriff*. *Vide* SHERIFF, No. 3. UNDER-SHERIFF.

SET-OFF.

† *Vide* ATTORNEY, No. 5. BANKRUPT, No. 10, 34. COSTS, No. 12. PLEA Pledged, No. 2, 3.

SETTLEMENT.

1. The removal of a *feme covert* is, *prima facie*, evidence that the husband's settlement is in the parish to which she was removed; *Rex v. Leigh*, M. 19 G. 3. 46; *Rex v. Hincksworth*, H. 18 G. 3. Page 46, n. [13]

† And this, although it is not expressly declared to be so in the order for her removal; *Rex v. Hincksworth*, H. 18 G. 3. 46, n. [13]

2. If the master of an apprentice die, and the executor, at the request of the apprentice, agree that he shall go to live with another person, a service of 40 days with such person, before the term of the apprenticeship expires, will gain a settlement; *Rex v. Stockland*, H. 19 G. 3. 70, 71

† Though an apprentice is not strictly assignable, nor transmissible, yet, if he continue with an assignee, or a personal representative, of his master, with the consent of all parties, and his own, that will be a continuation of the apprenticeship, to the effect of gaining a settlement; *Rex v. Stockland*, H. 19 G. 3. 70, 71

† Though a tenant has actually paid the *land-tax*, and his name is in the rate in a column of "occupiers," yet, if the landlord's name is in a column of "landlords rated," the tenant does not gain a settlement; *Rex v. St. John's*, T. 19 G. 3. 225, 226

† 6. If the title of a *land-tax rate* is "an assessment on the inhabitants of the parish of A." and both the landlord's and tenant's names are in the rate, but without any words import-

ing which is rated, and the tenant holds by paying a rent certain, clear of all taxes, parliamentary and parochial, and pays the rate, he gains a settlement; *Rex v. Mitchenham*, E. 23 G. 3. 226, n. [† 65]; *Rex v. Endon*, M. 24 G. 3. 227, n. [†] *Rex v. St. Lawrence*, M. 25 G. 3. Page 227, n. [†]

† 7. But if there is a column of proprietors and another of occupiers, and it is not specified in the rate which is rated, and the tenant, on paying the *land-tax*, takes a receipt in which the sum paid is described as "so much assessed on the landlord," the tenant gains no settlement; *Rex v. St. James's*, M. 25 G. 3. 227, n. [†]

8. If there is a hiring for a year, and service for part of that year, in the parish of A. and, before the end of the year, the servant removes, with the master, to the parish of B. serves out the year there, is hired to the same master for another year, with any increase of wages, and serves several months longer in B. without an interval, he gains a settlement in B.; *Rex v. Under-Barrow*, H. 20 G. 3. 309 to 311

9. Two services under different hirings may be tacked together, so as to make a sufficient service for a year, even where there has been an interruption between them, and an absence from the master's house for part of a day; *Rex v. Ellesfield*, H. 17 G. 3. 310, n. [1]

10. A hiring by the year to work by the piece, with an implied liberty, from the usage of the place, to be absent when the servant pleases, but not to work for any other master, and service under it, are sufficient, though the servant may have absented himself at different times in the course of the year; *Rex v. Birmingham*, H. 20 G. 3. 333 to 336

11. A militia-man being hired for a year, with an express agreement that he shall be absent on duty for a month, and, in lieu thereof, serve a month over the year, gains a settlement, without serving the additional

A Table of the Principal Matters.

- tional month; *Rex v. Winchcomb*, E. 20 G. 3. - Page 391 to 393
12. A *certificated* person having returned to the certifying parish, and remained there 18 years, a son, who was born to him there, being *hired*, and *servng* for a year, in the parish certified to, gains a settlement in that parish; *Rex v. Frampton*, T. 20 G. 3. 418, 419
13. When a *hiring*, on the face of it, necessarily appears to be for less than 365 days, no usage to consider the time specified in the hiring as a year, will make it sufficient for the purpose of gaining a settlement; *Rex v. Hanwood*, T. 20 G. 3. 439 to 441
14. But a *hiring* for a year from *Whitsuntide* to *Whitsuntide*, if such hiring is according to the usage of the country, is sufficient, although the space of time should be less than a year. - 440, 441
15. A *hiring* on the day after *Michaelmas*, so serve *till* the *Michaelmas* following, is sufficient, "*till Michaelmas*" being *inclusive*; *Rex v. Syderston*, E. 17 G. 3. 441, & n. [1]
16. If the name of a former occupier, who, to the knowledge of the parish officers, is dead, is continued in the *poor-rate*, but the present occupier pays, he shall gain a settlement; *Rex v. Heckmondwicke*, H. 21 G. 3. 564
17. When the title of the *poor-rate* is —"so much in the pound"—and the pauper's name is inserted in the rate, and, also, his yearly rent, and he pays at the rate of 2 s. in the pound for his specified rent, though nothing is written against his name in the column of "sums assessed," this is a sufficient rating and paying for the purpose of gaining a settlement; *Rex v. Carhampton*, H. 21 G. 3. 621, 622
18. If a man who is *insolvent*, has conveyed his *estate* to *trustees*, for the payment of his debts, and afterwards, before the trust is performed, gets *fraudulently* into *possession*, he will not gain a settlement by *residing* 40 days; *Rex v. St. Michael's*, E. 21 G. 3. - 630 to 632
19. Persons entitled to *administration* or *dower*, who *reside* on the *estate*, without *administration* granted, or *dower* assigned, do not gain a settlement. Page 63
20. *Qu.* If a sole next of kin would gain a settlement by *residence*, before *administration*. 63
21. A settlement may be gained by *residence* on a mere *equitable estate*. 631, 632
22. A *mortgagor* in possession gains a settlement. 63
- † 23. So, it should seem, does a *mortgagee* in possession. 63
24. When a servant has resided part of the year in one parish, and part in another, at different intervals, making, when added, more than 40 days in each, his settlement is in the parish where he slept the last night; *Rex v. Hulland*, E. 21 G. 3. 657, 658
Rex v. Iveslon, E. 23 G. 3. 658 n. [135]
25. A *marriage* is *void*, and no settlement gained under it, if celebrated in a chapel erected since 26 Geo. 2 (unless cured by 21 Geo. 3. c. 53), although marriages *de facto* may have been frequently celebrated there; *Rex v. Northfield*, E. 21 G. 3. 659 to 660
26. An *estate* being devised to *trustees* to be sold to pay debts, and to divide the surplus, if any, between A. B. and C., A. has an *equitable interest* in the estate, and by residing on it forty days, gains a settlement. *Rex v. Wivelingham*, E. 21 G. 3. 767 to 770
- † 27. But a person, though solely entitled to *administration*, if the whole would not thereby have vested in him for his own use, does not gain a settlement by a *residence* of 40 days on premises held for a term of years determinable on lives; *Rex v. North Curry*, M. 22 G. 3. 770, n. [† 169]
28. Residence on an *estate* coming by *devise*, though under the value of 30 gains a settlement, a devise not being a *purchase* within the meaning of 9 Geo. 1. c. 7; *Rex v. Wivelingham*, T. 21 G. 3. - 767 to 770
29. Residence on such an estate (N. 28.) though the devised interest is only *equitable*, discharges a *certificated* person. 770, n. [† 169]
- † SEV

A Table of the Principal Matters.

† SEVERANCE in Pleading.

† *Vide* *NOLI Prosequi*, No. 1. *Non-
Prov.*, No. 6, 7, 8, 9.

SHERIFF.

1. If a bailiff on a *fi. fa.* against the goods of *A.* take those of *B.* an action of *trespass* lies against the sheriff; *Ackworth v. Kempe*, *M.* 19 *G.* 3. Page 40 to 43
- † 2. The sheriff is answerable for the official acts of his under-sheriff. 43. n. [11]
3. Service of a rule to return a writ on the sheriff's agent in town, is not good service; *Rex v. Coles*, *T.* 20 *G.* 3. 420
4. By the true construction of 20 *G.* 2. c. 37. a sheriff is not liable to be called upon to return process, unless within six lunar months after the expiration of his office, and the day on which he goes out of office is to be reckoned part of the six months; *Rex v. Adderly*, *M.* 21 *G.* 3. 463 to 465
- † 5. And the only way to call upon him (so as to subject him to an attachment) is by a rule of court; *Rex v. Jones*, *B. R. T.* 27 *G.* 3. 463 n. [10]
6. In an action against the sheriff, for taking goods, without leaving the amount of a year's rent, the declaration need not state all the particulars of the demise, but if it does, they must be proved as laid; *Bristow v. Wright*, *E.* 21 *G.* 3. 665 to 669
7. A sheriff, or his officer, is not liable to an action, for arresting a certified bankrupt, a peer, a discharged insolvent debtor, or a person who took the benefit of 20 *G.* 3. c. 64. although the party is privileged from arrests; *Tarlton v. Fisher*, *E.* 21 *G.* 3. 671 to 677
8. *Vide* *ATTACHMENT*, No. 4. *BAIL*, No. 4, 5. *ELEGIT*, No. 1, 2. *MISRECITAL*, No. 4. *UNDER-SHERIFF*.

S H I P.

1. What debts contracted by the captain shall not be a lien upon the ship. *Vide* *LIEN*, No. 1.
2. A captain can only hypothecate the ship in foreign ports. Page 103.
3. *Vide* *FREIGHT*.

SHIP-Damage.

Vide *CHARTER-Party*, No. 2.

SMUGGLING.

Vide *ADMIRALTY*, No. 1. 2. *COSTS*, No. 1. *DAMAGES*, No. 1.

SOLVIT *post Diem*.

Qu. Whether the plea of *solvit post diem* can be pleaded to an action on an annuity bond. 520, 521, 522, 526, 527

† SPECIAL Memorandum.

Vide *BILL*, No. 1, 4.

† SPECIAL Verdict.

† *Vide* *MURDER*, No. 1.

SPIRITUAL Court.

1. An action will not lie for a malicious prosecution in the spiritual court, without shewing that the suit there is at an end; *Fisher v. Bristow*, *T.* 29 *G.* 3. 215
2. *Vide* *APPARITOR*. *PROBATE*. *PROCTOR*. *PROHIBITION*. *REGISTER*.

STAMPS.

1. If the admissions of several persons to the freedom of a corporation are entered on one stamp, the admission only of the first is good. 217, 218
 2. So, if two or more defendants in different actions are put into the same affidavit to hold to bail, it is not good, unless (perhaps) against the first named; *Gilby v. Hockyer*, *T.* 19 *G.* 3. 217, 218
- † 3. So

A Table of the Principal Matters.

† 3. So an *affidavit* to hold the same defendant to *bail* in two actions, viz. *debt* and *assumpsit*, is void as to both actions. Page 218, n. [† 64]

STATUTE.

1. All statutes *in pari materia* are to be construed as one law. 30

† 2. Difference between the words of 2 G. 2. c. 22, & 32 G. 2. c. 28. (called the *Lords' Act*) as to the time when the 2s. & 4d. (called the *groats*) are made payable to an insolvent debtor. 68, n. [† 33]

† 3. *Qu.* Whether 23 H. 6. c. 9. (relative to sheriff's bonds) is a public or private act. 96, 97, & n. [12]

† 4. That act (No. 3.) determined to be a public act; *Samuel v. Evans*, B. R. T. 28 G. 3. 97, n. [12]

5. It is an offence at common law, to obstruct the execution of a power created by statute and *indistinct*, without concluding *contra formam statuti*; *Rex v. Smith*, T. 20 G. 3. 441 to 446

6. But an *indictment* for an offence created by statute, must conclude *contra formam statuti*.

† 7. *Vide* PRIVATE Statute. PUBLIC Statute. Oyer, No. 4.

8. TABLE OF THE DIFFERENT STATUTES CITED AND OBSERVED UPON.

HENRY III.

An. Regn.

9. (*Magis. Chart.*) cap. 30. p. 607, 608.

52. (*Marlb.*) cap. 14. p. 190, 191.

EDWARD I.

23. fl. 1. (*Westm. 2.*) cap. 18. p. 474

— — cap. 19. p. 545.

— — cap. 30. p. 437, n. [1], 795.

— fl. 2. (*St. of Winchester*) cap. 1. p. 704, & n. [2]

18. fl. 1. (*Westm. 3. or Quia Empt.*) 627, & n. [1]

EDWARD III.

An. Regn.

1. fl. 2. cap. 2. p. 190.

14. cap. 39. p. 30.

28. cap. 11. p. 704, & n. (d)

31. fl. 1. cap. 11. p. 545.

RICHARD II.

2. fl. 1. cap. 5. p. 351, & n. (d)

6. cap. 5. p. 795.

13. fl. 1. cap. 5. p. 615, n.

15. cap. 3. p. 981, n. 615, d.

HENRY IV.

2. cap. 11. p. 615, n.

HENRY VI.

23. cap. 9. p. 94 to 97.

— cap. 15. p. 475, n. [1]

HENRY VII.

3. cap. 10. p. 651, n. [5], 709,

n. 752, n. [2], 753, n.

19. cap. 20. p. 752, n. [2], 753, n.

HENRY VIII.

22. cap. 5. (*St. of Bridges and Highway*), p. 189, & n. (g), 190.

† 27. cap. 10. (*St. of Usher*), p. 774, & n. (a)

32. cap. 1. (*St. of Will*), p. 34, & n. (b)

— cap. 28. p. 570, 573, 574.

— cap. 30. p. 115.

33. cap. 39. p. 415.

47. cap. 9. (*St. against Usury*), § 3, 5. p. 236, n. (a) § 2. p. 739, 740.

PHILIP & MARY.

1 & 2. cap. 7. p. 256.

4 & 5. (*Pro. Act*) p. 401 to 406.

ELIZABETH.

5. cap. 4. p. 518, § 35. p. 519.

— cap. 9. § 12. p. 556 to 561.

8. cap.

A Table of the Principal Matters.

ELIZABETH.

An. Regn.

8. cap. 5. p. 164, n.
13. cap. 5. p. 87.
- cap. 7. § 2. p. 716, n. [1]
- cap. 8. (*St. against Usury*), p. 236, n. (u), § 2. p. 739, § 3. p. 741.
- cap. 10. p. 750, 753, & n. (a), 574.
- cap. 29. p. 537.
14. cap. 11. § 19. p. 567.
18. cap. 3. p. 10, n. § 2. p. 662, & n. (u)
- cap. 11. p. 573, & n. (a), p. 574.
27. cap. 4. § 2. p. 716, n. [1]
- cap. 5. p. 61.
- cap. 8. p. 351, 352.
- cap. 13. p. 465, & n. (e), 704, n. (a)
31. cap. 5. § 5. p. 235, n. [15]
43. cap. 2. p. 116 to 118, 302 to 305, 346 to 350, 426, n. (b)

JAMES I.

1. cap. 15. p. 87. § 2. p. 296, † p. 84, n. [† 39], to 93, n. [†]
3. cap. 7. p. 200, n.
- cap. 8. p. 6.
- † cap. 15. p. 224 to 246, 245, n. [2], 264, n. (a), n. (b)
7. cap. 5. p. 307, 308.
21. cap. 17. (*St. against Usury*) § 2. p. 741.
- cap. 19. § 11. p. 317 to 320, † 167, n. [†], 320, n. [† 87]

CHARLES I.

3. cap. 1. (*Petition of Rights*) § 6. p. 423, & n. (b)

CHARLES II.

12. cap. 13. (*St. against Usury*), § 2. p. 741.
- cap. 23. § 36. p. 552, n. (a)
- cap. 24. § 33. p. 549 to 553, 549, n. (a), § 45. p. 412,

CHARLES II.

An. Regn.

- † § 33. p. 553, n. [† 113], 555, n. [†]
13. § 1. cap. 5. § 2. p. 592, & n. (c)
- 13 & 14. cap. 12. § 2. p. 193. § 21. p. 349, 350.
15. cap. 11. § 1. p. 413, § 13. p. 412, 413, 414, 415, 417, n.
16. cap. 7. § 3. p. 742, n. [1], 743.
- 16 & 17. cap. 3. p. 190.
- cap. 8. p. 61, § 1. p. 116, n.
- 22 & 23. cap. 9. § 136; or § 2. cap. 5. § 149. p. 780, & n. (a)
- cap. 25. p. 29, 30, § 3. p. 346.
29. cap. 3. (*St. of Frauds & Perjuries*) § 5. p. 35, 38, & n. [a], 241 to 244, & n. [2], § 6. p. 35, 244, n. [2], § 7. p. 25.
31. cap. 1. § 54. p. 423.

WILLIAM & MARY.

1. *Jeff.* 2. cap. 2. (*Bill of Rights*) § 1. art. 5. p. 592, & n. (d)
2. *Jeff.* 1. cap. 5. § 2. p. 280, 281.
3. cap. 11. § 11. p. 333, & n. [1]
- cap. 14. p. 714.
4. cap. 1. § 6. p. 625, & n. [1], 626, & n. (b), § 13. p. 625, & n. [2], § 34. p. 626, & n. (a)
- † 4 & 5. cap. 1. § 6. p. 625, n. [1]
- cap. 24. p. 189.
5. cap. 10. p. 525.

WILLIAM III.

7. cap. 3. p. 591, n. [1], § 1. p. 591, n. [2]
- cap. 32. § 4. p. 189, & n. (d)
- 8 & 9. cap. 11. p. 50. § 8. p. 521, † § 4. p. 108, n. [† 56]
- cap. 30. p. 310, n. [1]
- 9 & 10. cap. 17. § 1. p. 399, n. [†]
13. cap. 5. p. 415. § 17, 18. p. 417, n.

ANNE.

A Table of the Principal Matters,

ANNE.

An. Regn.

1. *ft.* 1. *cap.* 1. § 8. p. 545, & n. (a)
- *ft.* 2. *cap.* 3. p. 417, n.
- 3 & 4. *cap.* 9. § 5. p. 299, n. [15]
- *cap.* 18. p. 188, 189.
4. *cap.* 3. p. 190.
- 4 & 5. *cap.* 16. § 5. p. 678, n. [2], 709, n. [2], § 9. p. 280, 281, 282, 283, § 12. p. 520, 521, 522, 523, 524, § 16. n. 486, n. (u), § 17. p. 102, n. [1], † § 10. p. 23, n. [† 10]
- † — *cap.* 17. p. 168, n. [†]
5. *cap.* 14. p. 29, 30.
6. *cap.* 37. p. 607.
7. *cap.* 21. § 11. p. 596, & n. (a)
8. *cap.* 9. § 6. p. 413. § 9. p. 413. § 19. p. 413, 414. § 27. p. 413, 414, 415.
8. *cap.* 14. § 1. p. 665 to 669.
9. *cap.* 11. § 47. p. 552.
- † — *cap.* 14. § 1. p. 741, 743, § 2. p. 696. n. (b), n. (c)
- *cap.* 20. p. 154, 156, 157. § 8. p. 397 to 401.
- *cap.* 21. § 7. p. 413.
- *cap.* 27. p. 607.
12. *ft.* 1. *cap.* 2. § 37. p. 552.
- *ft.* 2. *cap.* 16. (*St. against Usury*), p. 235, & n. (w), 236, 237, 741, 743.

GEORGE I.

1. *ft.* 2. *cap.* 5. § 6. p. 435, n. (a), § 4, 6, 8. p. 699 to 707, 702, n. [3], to 704, n.
3. *cap.* 11. p. 29, 30.
5. *cap.* 13. p. 61.
6. *cap.* 21. § 20, 21. p. 549, 550, 552, § 22. p. 550, 551, § 31. p. 609, & n. (a), † § 21. p. 553, n. [† 113], 554, n. [†], 555, n. [†], § 22. 553, n. [† 113], 554, n. [†]

GEORGE I.

An. Regn.

7. *cap.* 31. p. 164, 165, & n. 9. § 1, 2. p. 670, & n. (b), † p. 167, n. [†], 168, n. [†]
- † 8. *cap.* 18. § 16. p. 554, n. [†],
9. *cap.* 7. p. 767 to 770. § 4. p. 117, n. (i), 331 to 333. § 8. p. 193, n. (g)
- *cap.* 22. (*Black Act*), p. 704, n. (b)
- † 10. *cap.* 10. § 42. p. 553, n. [† 113], 554, n. [†], 555, n. [†]
- † 11. *cap.* 30. § 16, 19. p. 553, n. [† 113], to 555, n. [†], § 27. p. 555, n. [† 114]
12. *cap.* 29. p. 330, n. [†]
- *cap.* 29. p. 218, n. (b), § 2. p. 467, n. (a)

GEORGE II.

1. *ft.* 2. *cap.* 16. § 3. p. 551, 552.
2. *cap.* 23. § 23. p. 200, n.
- *cap.* 24. p. 16. § 4. p. 426, n. (a)
4. *cap.* 28. p. 176. § 5. p. 627, 628. § 6. p. 568.
5. *cap.* 27. p. 218, n. (b)
- *cap.* 30. p. 160 to 166, 228 to 231. § 9. p. 46 to 49. § 11. p. 695, n. [3], to 698, n. § 28. p. 408, & n. (x), § 29. p. 408, & n. (r), 584, 585, § 41. p. 257 to 260, 258, n. [1], † § 13. p. 676, n. (u)
6. *cap.* 3. p. 9.
8. *cap.* 16. p. 704, n. (a)
11. *cap.* 19. § 14. p. 246. § 18. p. 176, n. [17], 668, & n. (d), § 19. p. 280. § 21. p. 283, & n. (u)
12. *cap.* 13. § 6. p. 200, n.
17. *cap.* 34. § 2. p. 619, n. & n. (a)
- † 19. *cap.* 32. § 2. p. 166, n. [† 55], 167, n. [†], 168, n. [†]
- *cap.* 34. p. 107.

A Table of the Principal Matters.

GEORGE II.

An. Regn.

- 19. cap. 37. p. 385, & n. (b),
386, 468 to 472.
- 20. cap. 37. § 2 p. 463 to 465.
- 21. cap. 3. p. 208, n. (b)
- † 23. cap. 2. § 3 p. 554, n. [†]
- cap. 31. § 1. p. 194.
- cap. 27. p. 38, & n. (u), §
1. p. 382, n. (z)
- cap. 30. p. 245, n. [2], &
n. (a), § 1. p. 246, n.
[1], § 20. p. 264, n. (a),
n. (b)
- cap. 33. p. 246, 247, 381,
382. § 1. p. 382, & n. (z),
§ 4. p. 264, & n. [1],
381, n. [15], § 10. p.
264, n. [1], 448, 449.
- † 24. cap. 18. § 1. p. 108, & n.
(c), & n. [† 46]
- † 25. cap. 6. § 10. p. 381, n. [15]
- cap. 42. p. 381, & n. [16]
- 26. cap. 33. § 1, 8. p. 659,
661, n. [1]
- 29. cap. 34. § 2. p. 619, n. &
n. (b)
- 30. cap. 2. p. 433.
- cap. 19. § 75. p. 200, n. (d)
- 32. cap. 28. (*The Lords' Act*)
§ 13. p. 68 to 69.

GEORGE III.

- 14. cap. 2. § 32. p. 626, & n.
(c)
- cap. 3. § 22. p. 424, n. (a),
§ 33. p. 434, n. (c), §
73. p. 425, n. (e)
- cap. 15. § 46. p. 108, & n.
(a)
- 5. cap. 14. § 3, 4. 517, 518.
- cap. 30. § 13. p. 676, & n.
(u)
- 13. cap. 15. (*Welsh jurisdiction*
Act, p. 213, n. [10]
- cap. 78. § 45, 47. p. 421,
& n. (a), 422, & n. (a)
- 14. cap. 91. p. 441 to 446.
- 16. cap. 5. p. 254, 255. § 1,
2. p. 254, n. [1], 255, n.
- cap. 38. p. 97 to 101, 393.
- 17. cap. 18. p. 441 to 446.

Vol. II.

GEORGE III.

An. Regn.

- 17. cap. 26. p. 484, n. [1]
- cap. 46. p. 15 to 16.
- 18. cap. 352. p. 100. § 12. p.
472, & n. (a), § 14. p.
472. § 37. 40, 41. p. 670,
& n. [1], & n. (a), 671,
677, & n. (b)
- cap. 60. p. 592, & n. (b),
593.
- 19. cap. 16. p. 423, & n. (a),
§ 26. p. 424, n. (a), §
31. p. 424, n. (b), § 37.
p. 424, n. (c), § 80. p.
423.
- cap. 57. p. 401 to 406, &
n. [1]
- cap. 60. p. 401 to 406, &
n. [1]
- 19. cap. 67. p. 325, & n. (i),
§ 2. p. 619, n. & n. (c),
† § 21. p. 648, & n. (a),
§ 44. p. 647.
- 20. cap. 12. § 26. p. 424, n.
(a), § 31. p. 424, n. (b),
§ 37. p. 424, n. (c), § 71.
p. 486, & n. (c), § 77.
p. 425, n. (c), § 29. p.
423, & n. (c).
- † — cap. 17. (*Powys's Act*) 227,
n. [†], Errata.
- cap. 64. p. 671 to 677.
- 21. cap. 53. p. 661, n. [1]
- † — cap. 55. § 47. p. 554, n.
[†], & n. (e)
- † — cap. 64. p. 554, n. [†], &
n. (d)
- † 22. cap. 25. § 1, 2, 3. p. 650, n.
- † 26. cap. 57. § 38. p. 93, n. [1]

STOCK.

1. An action on the case will lie against the Bank, &c. for refusing to transfer stock; *Re v. The Bank of England*, M. 21 G. 3. 524 to 526, 528, n. [1], 529, n.
2. Stock given by will does not vest immediately in the legatee, but in the executor or administrator in trust for him. 525, 526

FF

STORES.

A Table of the Principal Matters.

STORES.

The captain of a *ship* has not a *lien* on the ship for stores and provisions furnished on his credit; *Wilkins v. Carmichael*, H. 19 G. 3.

Page 101 to 105

† SUBSCRIBING *Witness*.

2. *Vide* ACKNOWLEDGMENT, No. 1,
2. EVIDENCE.

† SUPPRESSIO *Veri*.

† An *action* will lie for a *suppressio veri* in a return as well as for an *allegatio falsi*. 158, 159

SURETY.

Vide BANKRUPT, No. 7, 13, 14, 15, 16, 17, 18.

SURPLUSAGE.

Instances of what shall be deemed surplusage. *Vide* ADMINISTRATION, No. 2. ALLEGATION, No. 1. JUDGMENT, No. 5.

SURRENDER.

1. A surrender executed by a *witness* removes the objection of *interest*, although the surrenderee refuse to accept it; *Goodtitle v. Welford*, E. 19 G. 3. 139 to 141
2. Surrender of *copyhold*. *Vide* MORTGAGE, No. 15, 16. WILL, No. 34.

T.

TAX.

† *Vide* LAND-Tax.

TAXATION of *Costs*.

Vide AGENT, No. 1. ATTORNEY, No. 4, 5, 6. COSTS, No. 10.

TENANT.

1. Tenants in ancient *demesne* are exempt from serving on *jurier* in the courts of common law. Page 199
2. *Vide* CUSTOM, No. 4. DEMAND, No. 1, 2, 3, 4. DISTRESS, No. 1, 2. LEASE. POOR-Rate, No. 14. RELEASE, No. 2.

TENDER.

Vide † BILL, No. 5. COSTS, No. 11.

“TENOR.”

The word “*tenor*” binds the party to a literal recital. 194

† TERM.

† *Vide* LEASE.

TESTAMENT, TESTATOR.

Vide WILL.

✂ TESTAMENTARY *Paper*.

✂ *Vide* FEME COVERT, No. 5.

“TILL.”

Instance where the expression “till such a day,” includes the day; *Rex v. Syderton*, E. 17 G. 3. 441, b [1]

TILLAGE.

The *statute* of tillage. *Vide* LIMITATION of *Actions*, No. 1.

TIME.

The time allowed in different cases by *statute*, construction of law, or the rules of practice. *Vide* HUR and Cry. HUNDRED, No. 2. MONTH. PLEA PLEADED. SHERIFF, No. 4.

TITLE for *holy Orders*.

1. The form of one. 143
2. The

A Table of the Principal Matters.

2. The nature thereof explained.

Page 142 to 148

3. If the title is an appointment to be curate of the rector's church—till otherwise provided of some ecclesiastical preferment, or, for fault by him committed, lawfully removed—the party cannot be removed, without cause, while the grantor remains rector of that parish; *Martyn v. Hind*, B. R. E. 16 G. 3. 143 to 147
4. And he may bring *assumpsit* against the rector for the salary; *Martyn v. Hind*, B. R. E. 16 G. 3. 143 to 145
5. But, if the rector is, *bona fide*, preferred to another living, the obligation ceases; *Martyn v. Hind*, E. 19 G. 3. 142 to 148
6. A readership is not ecclesiastical preferment within the meaning of such a title (No. 3.) *Martyn v. Hind*, E. 19 G. 3. 142 to 148

TOLLS.

1. Tolls are *rateable* to the poor. 305, & n. [2]
2. A general *indebitatus assumpsit* will lie for tolls 728, n. [C]

TOTAL Loss.

Vide INSURANCE, No. 10, 12, 50, 52, 53.

TOWER Hamlets.

The court of the Tower Hamlets. *Vide* COURT, No. 6.

† TRADER.

† *Vide* BANKRUPT.

TRANSFER.

Vide STOCK, No. 1.

† TRANSCRIPT.

† Only a transcript of the record is removed into *Cam. Scacc.* on a writ of error from B. R. 352, n. [3]

TRAVERSE.

Though, in general, a traverse ought to conclude with a *verification*, yet, when it denies the whole substance of the *plea*, the proper conclusion is to the country. Page 95, n. [10], 96, n. 429, n. [1]

TREASON.

1. A party indicted for high treason is entitled to a copy of the indictment, and lists of the witnesses for the Crown, and of the jurymen who are to be returned on the panel, ten days before his arraignment; *Rex v. Lord George Gordon*, H. 21 G. 3. 590, 591 & n. [1], [2]
2. It is high-treason to attempt by intimidation and violence to compel the repeal of a law; *Rex v. Lord George Gordon*, H. 21 G. 3. 590 to 592
3. The method of procedure on a trial at bar for high treason; *Rex v. Lord George Gordon*, H. 21 G. 3. 590, 591

TRESPASS *Vi & Armis*.

1. Trespas will lie against the sheriff if his officer take the goods of A. on a *fi. fa.* against those of B; *Ackworth v. Kempe*, M. 19 G. 3. 40 to 43
2. Bankruptcy is not a bar to trespas for *mesne profits*; *Goodtitle v. North*, H. 21 G. 3. 584, 585
3. Trespas will not lie for an imprisonment which was merely in consequence of the capture of a ship as prize, although the ship shall have been acquitted; *Le Caux v. Eden*, H. 21 G. 3. 594 to 613
4. *Qu.* If it will lie for unnecessary personal severity by the captor. 599, 601
5. The defendant may avail himself of the defence of capture as prize on the plea of the general issue; *Le Caux v. Eden*, H. 21 G. 3. 594 to 613
6. Trespas will not lie against the sheriff or his officer for arresting a certified bankrupt, a peer, a discharged insolvent,

F f 2

A Table of the Principal Matters.

- insolvent, *Sc. Tarlton v. Fisher, E. 21 G. 3.* Page 671 to 677
- 7. Instances where a man may justify going on another's land. 747
- 8. *Vide* COSTS, No. 2, 19. Non-Prov., No. 9. PLEADING, No. 10.

TRIAL.

- 1. When the cause has been suspended, after *issue* joined, for above a year, the defendant is entitled to a term's notice of trial. 71
- 2. But, not if he himself has stopped the plaintiff by an *injunction*; *Hayley v. Rids, H. 19 G. 3.* 71, 72
- 3. The same exception to the rule holds in the court of *Common Pleas*. 72, n. [7]
- 4. *Inferior courts* cannot grant a new trial. 380
- 5. If a party refuse to consent to the examination of a *witness* to an essential fact by commission, when his presence cannot be compelled, or to admit the fact, the court will assist the other party, by putting off the trial; *Furly v. Newnham, T. 20 G. 3.* 419, 420
- 6. The grounds for granting a trial at bar. 437, 438
- 7. The court may lay the party applying for a trial at bar under the terms of paying *bar costs*, and receiving only *Nisi Prius* costs; *Holmes v. Brown, T. 20 G. 3.* 437, 438
- 8. Where a new trial has been granted, and nothing said in the rule about the costs of the first, although the second *verdict* is for the same party as the first, he shall not have the costs of the first trial; *Mason v. Skurray, T. 26 G. 3.* 438
- 9. *Vide* PRACTICE, No. 4, 5.

TROVER.

- 1. If a horse is given in exchange for another, which is warranted sound, and proves unsound, trover will not lie for the horse given in exchange; *Power v. Wells, B. R. E. 18 G. 3.* 24, & n. [8]
- 2. A demand against a bankrupt cannot

be set off, in an action of trover by his assignees, for a conversion subsequent to the bankruptcy; *Willins v. Gar-michael, H. 19 G. 3.* Page 101 to 105

† 3. But a demand in trover, when for a liquidated amount, may be proved under a commission of bankruptcy. 168, n. [†]

TRUST, TRUSTEE.

- † 1. A bare trustee is a competent witness to prove the execution of the deed to himself. 145, n. [† 51]
- 2. *Vide* EJECTMENT, No. 3. 4. EQUITABLE ESTATE. INSOLVENT Debtor, No. 5. STOCK, No. 2. WILL, No. 33.

U.

UNDER-LEASE, UNDER-TENANT.

Vide COVENANT, No. 4. LEASE, No. 5, 8, 9, 10, 11, 14.

† UNDER-SHERIFF.

- † 1. Service of a rule on the under-sheriff's agent in town is not good service; *Rex v. Coles, T. 20 G. 3.* 420
- † 2. But service at the offices of the agents for the under-sheriffs of London, Middlesex, and Surry, is, because they are considered as the offices of the under-sheriffs. 420
- † 3. *Vide* SHERIFF.

UNDER-WRITER.

Vide INSURANCE.

UNIVERSITY.

Vide OXFORD.

† USAGE.

- † Instances where usage may be given

A Table of the Principal Matters.

in evidence. Page 510 to 513. 515.
654. n. [†]

USE.

1. A declaration of uses not in writing will *rebut* the resulting use to the *conform* of a *fine*, in favour of the *conusee*. 26
2. Uses and trusts were originally the same. 774
3. *Vide* KINE, No. 1. 2.
- † 4. The statutes of uses. *Vide* the TABLE of Statutes after title STATUTE.

USE and Occupation.

Vide COURT, No. 4.

USURY.

1. If there is an agreement to pay legal interest, and a premium is paid down, over and above the interest, the agreement is usurious and void; *Fisher v. Beasley*, T. 19 G. 3. 235 to 237
2. But the penalty under 12 Ann. st. 2. c. 16. is not incurred, if the premium itself does not exceed legal interest, nor till more than legal interest is actually received; *Fisher v. Beasley*, T. 19 G. 3. 235 to 237
3. Therefore, an action may be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it is not a year since what has been paid exceeded legal interest; *Fisher v. Beasley*, T. 19 G. 3. 235 to 237
4. When, upon a negotiation for a loan of money, the lender says, he cannot advance the money, but will furnish goods, which the other takes and sells, if the security given is for a sum of money made payable at a future day, greatly exceeding the value of the goods and 5 per cent. interest, this is an usurious loan, and the security and contract are both void; *Lowe v. Waller*, T. 21 G. 3. 736 to 734
- † 5. Equity will assist the borrower on an usurious contract, to retain all but the legal interest. 697, n.

† 6. Or to recover back what has been paid, on such a contract (No. 5.), above the principal and legal interest. Page 698, n.

† 7. For which also (No. 5.), an action will lie. 698, n.

† 8. And if a party pawn goods on an usurious loan, he cannot recover back the goods, in trover, unless he has first tendered the money really advanced, and legal interest; *Fitzroy v. Gavillan*, B. R. E. 26 G. 3. 698, n. [†]

9. A bill of exchange given upon an usurious contract is void in the hands of an indorsee, though for valuable consideration, and without notice; *Lowe v. Waller*, T. 21 G. 3. 736 to 744

† 10. It is not usury for a country banker in discounting bills to take, over and above the 5 per cent. discount, a commission, agreeable to the usage, on the amount of the bill; *Benjan v. Parry*, B. R. M. 21 G. 3. 236, n. [†]

11. *Vide* AMENDMENT, No. 9. PLEADING, No. 12.

† 12. Statutes of Usury. *Vide* the TABLE of Statutes after title STATUTE.

V.

VALUABLE Consideration.

Vide BILL of Exchange, No. 5, 7, 12, 15, 16, 17. CONSIDERATION. DECREE, No. 1. EQUITTY, No. 1. GAMING, No. 3. JUDGMENT, No. 7. POWER, No. 4.

VARIANCE.

1. Where a word is *mis-recited* and mutilated, in an *indisment*, and the party has bound himself to a literal recital, it is fatal, if the mutilated word is itself a word, though it do not make sense with the context; but not if it is not a word; *Ben v. Beuch*, M. 15 G. 3. 194, n. [25]
2. Yet

A Table of the Principal Matters.

1. Yet "*Australia*" in the name of the *South Sea* company, instead of *Australia*, has been held to be fatal in an *action*. Page 194, n. [25]
3. In an *action* founded on a *statute* of *Pl. and Mar.* it is a fatal mistake in the description, to *declare* upon it as of the same year of both; *Rann v. Green*, B. R. M. 17 G. 3. 402
4. In an *action* against the *sheriff* for not leaving a year's *rent*, if the demise is particularly set forth, and not proved as laid, it is fatal; *Bristow v. Wright*, E. 21 G. 3. 665 to 669
5. A promise being *declared* on to deliver—"good merchandizable wheat"—and the *evidence* being of a promise to deliver—"good second sort of wheat"—the variance is fatal 666
6. Upon an issue—"Whether *A.* devised to *B.* and his heirs"—it is a fatal variance if the *evidence* is of a devise—"to *C.* for years, remainder to *B.* in fee." 666
7. In *debt* for *rent*, the *declaration* being on a demise "for 15l. rent," under a power "to make *leases* for 21 years," and the *evidence* being of a demise for "15l. rent, and three fowls," under a power "to make *leases* for 21 years in possession, and not in *reversion*, rendering the ancient rent, and not *dispunishable* of waste," the variance is fatal. 666
8. In an *action* by a *landlord* against his *tenant*, for negligently keeping his fire, if the *declaration* is of a demise for a term of years, and the *evidence* of a *lease* from year to year, it is fatal. 668
9. So, in an *action* on 11 Geo. 2. c. 19. § 18. for double *rent*, if the plaintiff *declare* on a demise for three years, and prove a *lease* from year to year; *Shute v. Hornsey*, E. 19 G. 3. 668, & n. (c)
10. What introductory words bind the party to a literal *recital*. *Vide RE- CITAL*, No. 1, 2. MISRECITAL.

VENIRE de novo.

1. A *venire de novo* may be granted when there is a general *verdict* for entire *damages*, and there was *evi-*

- dence on all the *counts*, and some of them are bad in law. Page 377, 378
2. A court of error may grant a *venire de novo*; *Grant v. Affle*, T. 21 G. 3. 722 to 731
 3. But there is no instance of a court of error granting a *venire de novo* to an inferior court; *Trevor v. Wall*, B. R. E. 26 G. 3. 732, n. [† 157]
 4. The court of B. R. will grant a *venire de novo* to the *great sessions* in *Wales*; *Davies v. Pierce*, B. R. M. 28 G. 3. 732, n. [† 157]

VENUE.

Vide WALES, No. 4.

VERDICT.

- † 1. On an *information*, under a private *statute*, a *misrecital* of the commencement of the *parliament* is fatal, after *verdict*, on the plea of *not guilty*. 97, n. [† 41]
2. It is a general rule, that the court will not set aside a *verdict* in an *action* for a personal injury, on account of the smallness of the *damages*; *Maurice v. Brecknock*, M. 21 G. 3. 509, 510
3. Unless the smallness of the *damages* arose from a mistake in point of law. 510, n. [2]
4. A *verdict* cures ambiguity, or an imperfect state of the plaintiff's title, but not an omission of what is the gist of the *action*. 683
5. After *verdict* nothing is to be *presumed*, but what is either expressly stated in the *declaration*, or necessarily implied from those facts which are stated; *Spiers v. Parker*, B. R. H. 26 G. 3. 682, n. [†]
6. If there is a general *verdict*, and entire *damages*, on a *declaration* containing some *counts* bad in law, it is *error*, and not cured by *verdict*. 377, 730
7. If there is a general *verdict* of "guilty" on an *indictment*, it is sufficient if one of the *counts* is good. 730
8. *Vide*

A Table of the Principal Matters.

3. *Vide* MURDER, No. 1. PRACTICE, No. 4, 5. TRIAL, No. 8. *Venire de novo*.

VERIFICATION.

1. A verification is the proper conclusion of the replication to a plea to a *scire facias* against bail—"that the principal died before the return of any *ca. sa.*"—when the replication mentions a particular *ca. sa.* and alleges that he was alive at the return thereof; *Chandler v. Roberts*, H. 19 G. 3. Page 58 to 61
2. A verification is the necessary conclusion, whenever new matter is introduced. 60
3. It is a bad conclusion (if specially demurred to) to a plea of the statute of 23 Hen. 6. c. 9.; *Boyce v. Whitaker*, H. 19 G. 3. 94 to 97
4. *Vide* PLEADING, No. 13, 14.

VILLENAGE.

Vide COPYHOLD, No. 4.

VIRTUAL or implied Acts or Words.

Vide BILL of Exchange, No. 9. INTENDMENT. MORTGAGE, No. 9.

VOID.

Instances of things void in law. *Vide* AGREEMENT, No. 4, 7. BANKRUPT, No. 24, 26, 30. BASTARD, No. 4. BILL of Exchange, No. 5, 12. CONVICTION, No. 1, 5, 6. CUSTOM, No. 6. DECREE, No. 1. FINE, No. 3. GAMING. INDICTMENT, No. 1, 7. INSURANCE, No. 16, 29, 51. JUDGMENT, No. 6. LEASE, No. 1, 3, 4, 5, 6, 9, 15. MARRIAGE, No. 3. MODUS, No. 1. MUTINY *AB*, No. 1. OVERSEER, No. 1. POWER, No. 9. USURY, No. 1, 4. WILL, No. 28.

VOYAGE.

Vide INSURANCE, No. 6, 7, 10, 12, 13, 16, 17, 21, 22, 23, 24, 25, 26, 46, 47. AGREEMENT, No. 5.

W.

WAGES.

1. A Captain of a ship has no lien on the ship for his wages; *Wilkins v. Carmichael*, H. 19 G. 3. Page 101 to 105
2. When two services, under different hirings, amount together to a year, if they are uninterrupted, an increase of wages for the second service does not prevent the servant from gaining a settlement; *Rex v. Under-Barrow*, H. 20 G. 3. 309 to 311
3. No wages are due to a sailor, unless the freight is earned; *Abernethy v. Landale*, M. 21 G. 3. 539 to 542
4. *Vide* AGREEMENT, No. 5.

WAIVER.

1. If a party appear on the execution of a writ of enquiry, he shall not afterwards object that the place was not within the county; *Bullock v. Barrow*, B. R. E. 27 G. 3. 797, n. [C]
2. *Vide* ANNUITY, No. 3, 4.

WALES.

1. The ground of a judgment in one of the courts of Great Sessions, may be questioned in an action upon the judgment. 6
2. The writ of *latitat* runs into Wales; *Perry v. Jones*, T. 19 G. 3. 213, *Lloyd v. Jones*, B. R. T. 9 G. 3. 213, n. [10]
3. Civil proceedings cannot be removed by *certiorari* from the courts of Great Sessions, without special cause; *Williams v. Thomas*, B. R. E. 22 G. 3. 751, n. [2]
4. *Qu.* Whether the venue can be changed from an *English* to a *Welsh* county. 262, 263, & n. [1], † 263, n. [† 73]
5. The court of B. R. will award a *venire de novo* to the Great Sessions in Wales; *Davis v. Pierce*, B. R. M. 28 G. 3. 732, n. [† 157 C] † 6. Welsh

A Table of the Principal Matters.

† 6. Welsh Jurisdiction Act. *Vide* the TABLE of Statutes after title STATUTE.

WAPENTAKE.

A lord of a wapentake cannot grant a deputation to kill game; the Earl of Ailesbury v. Patifon, M. 19 G. 3. Page 28 to 30

W A R.

† *Vide* ALIEN Enemy, INSURANCE, No. 14, 15, 41, 50, 51.

WARRANT of Attorney.

Vide AMENDMENT, No. 1, 2, 3. ATTORNEY, No. 3. PRACTICE, No. 6.

WARRANT of a Magistrate.

Vide PEACE-Officer. POOR-Rate, No. 14.

WARRANTY.

Vide ASSUMPSIT, No. 2, 3. INSURANCE, No. 1, 2, 3, 4, 8, 9, 32, 33, 34, 35, 36, 41, 43, 46, 47, 50, 51. TROVER, No. 1.

W A Y.

1. The owner of a private way is bound to repair it; *Taylor v. Whitehead*, T. 21 G. 3. 745 to 749
2. And if it is over-flowed by an adjoining river, he cannot justify going upon the contiguous land; *Taylor v. Whitehead*, T. 21 G. 3. 745 to 749
3. *Vide* HIGHWAY.

W A Y-going Crop.

Vide CUSTOM, No. 4.

WESTMINSTER.

1. The court of conscience for Westminster. *Vide* ATTORNEY, No. 17.
- † 2. The Statute of Westm. 2. *Vide*

the TABLE of Statutes after title STATUTE.

† 3. The Statute of Westm. 3. (*Quia Emptores*) *Vide* the TABLE of Statutes after title STATUTE.

W I L L.

1. An implied revocation of a will may be rebutted by parol evidence; *Brady v. Oubin*, M. 19 G. 3. Page 31 to 40
2. A will revoked by implication may be republished, by reference to it in an instrument attested according to the Statute of Frauds, 19 Car. 2. c. 3. *Brady v. Oubin*, M. 19 G. 3. 31 to 40
3. Marriage, and the birth of a child, amount to a revocation of a will, if it is of all the testator's land. 39
4. Marriage alone is a revocation of a will of land by a woman. 35
5. Land may pass by the word "legacy." 40
6. If a will is in two parts, and the testator destroys the one in his own custody, that is a revocation. 40
7. A will revoked by a subsequent will, but not cancelled, is re-established by cancelling the subsequent will. 40
8. A republication requires the same solemnities as the original publication. 36
9. Instance of a prior devise operating as a condition precedent; *Doe v. Shipphard*, H. 19 G. 3. 75 to 79
10. Instance where a prior devise does not operate as a condition precedent; *Bradford v. Foley*, H. 19 G. 3. 63 to 66
11. If a testator, having one child, and supposing his wife *enscint*, devise his estate in jointies, between the children (if the unborn child should be a daughter) and the wife, with survivorship between the children as to their moiety, and that moiety over to the wife if both children should die before 21, without mentioning the event of the wife not having a child, the wife, though not *enscint*, shall take the whole on the death of the only child before that age; *Statham v. Bell*,

A Table of the Principal Matters.

v. *Bell*, B. R. E. 14 G. 3. Page 66,
& n. [4], 67, n.

12. If a *testator* is in a state of insensibility when his will is attested, it is not executed within the meaning of the *statute of frauds*, 29 Car. 2. c. 3. although he be corporeally present; *Right v. Price*, M. 20 G. 3. 241 to 244

13. It is sufficient if the *testator* was in a situation where he might have seen the *witnesses* sign. - 242

14. The *sealing* of a will is a *signing* within the meaning of the *statute of frauds*; *Lee v. Libb*, B. R. M. 1 W. & M. - 242, [b]

15. It is not necessary that the *testator* should sign in presence of the *witnesses*, if he acknowledge his handwriting to them all. 244, n. [c]

16. And such acknowledgment may be to each at different times. 244, n. [c]

17. So a *revocation* is good, if the *testator* acknowledge his signature, though he do not sign in the presence of the *witnesses*. - 244, n. [c]

18. Inaccuracies in that part of the *statute of frauds* which relates to wills. - 244, n. [2]

19. If an estate is *devise*d to the *testator*'s son for *life*, and after his death, to the son's *children*, and their heirs, and in case the son die without issue, then to the *testator*'s two daughters then in *esse*, and their heirs, the estate to the children of the son, and that to the daughters, are both *contingent remainders* in fee; *Goodright v. Dunham*, M. 20 G. 3. 264 to 268

20. In a *devise* to the *testator*'s son, and, if the *testator*'s three daughters over-live the son and his heirs, then to them, the words "his heirs," mean heirs of the body, because the daughters could never over-live the collateral heirs of the son, coming under that description themselves. 266, 267

21. Under a *devise* to *A.* when he shall be 21 years of age of the fee-simple and inheritance of *S.* to him and his child or children for ever, but, if he die before that time, then the fee-simple and inheritance to *B.* for ever (there being no child of *A.* in

esse), *A.* takes an estate-tail; *Davis v. Stevens*, H. 20 G. 3.

Page 321 to 324

22. If there is a *devise* to *A.* and the heirs of his body, and, for want of such issue, to *B.* and *A.* die before the *testator*, leaving issue who survive the *testator*, such issue shall take nothing, and the limitation to *B.* shall vest as an immediate estate, on the *testator*'s death; *Hodgson v. Ambrose*, E. 20 G. 3. - 337 to 345

23. And this, although *A.* was the *testator*'s heir at law; *Warner v. White*, B. R. M. 22 G. 3. 344, n. [4], 345, n.

24. By *devise* to *A.* for life, remainder to trustees to support contingent remainders during *A.*'s life, and, from and after his decease, then to the heirs of his body, *A.* takes an estate for life, with a vested remainder to himself in tail, the words "heirs of the body," being words of limitation; *Hodgson v. Ambrose*, E. 20 G. 3. 337 to 345, & n. [5]

25. A *devise* of all the *testator*'s real estate in *A.* to *B.* during life, and, at *B.*'s death, to the children of *B.* with remainder over, gives either an estate-tail to *B.* or an estate for life to *B.* with remainder in tail to *B.*'s children; *Hodges v. Middleton*, T. 20 G. 3. - 431 to 435

26. An estate to *A.* for life by a deed, and a limitation of the same estate to the heirs of the body of *A.* by a will (though the estate by the deed was voluntary, and moved from the *testator*, and is recited in the will), do not unite so as to give *A.* an estate-tail, but the heirs of his body take a contingent estate by purchase; *Doe v. Fonnereau*, M. 21 G. 3. 487 to 509

27. A *devise* of a real estate to *A.* after a good *executory devise* thereof to the heirs-male of the body of *B.* and limited on default of such issue, is a good *executory devise*, vesting either in possession on the death of *B.* without leaving issue, or as a remainder on his death leaving issue; *Doe v. Fonnereau*, M. 21 G. 3. 487 to 509

28. A *devise* after failure of the issue or heirs of *A.* without any previous limitation

A Table of the Principal Matters.

limitation to such issue or heirs, is void in its creation.

Page 506, n. 507, n.

29. If after a preceding limitation to such issue or heirs, it is not void.

506, n.

30. A devise of personal estate to (or conveyance in trust for) one and the heirs of his body vests the whole interest in him.

506, n.

31. The will of a *feme covert*, authorized by a power in her marriage settlement, cannot be given in evidence to shew a title to personal estate, till it is proved in the ecclesiastical court; *Stone v. Forsyth*, T. 21 G. 3.

707 to 709

32. And the regular course in that court, is, not to give probate of the will, but administration, with the will, as a testamentary paper, annexed.

709, n. [† 150]

33. A change merely of the legal estate from one trustee to another is not a revocation of the will of *cestui que trust*; *Doe v. Pott*, 21 G. 3. 710 to 722; *Watts v. Fullarton*, Canc. T. 14 G. 3.

718, 719

34. A testator having devised all the residue of his estate, of what nature, kind or quality whatsoever, and having afterwards purchased, and been admitted to, a copyhold estate, and having surrendered it "to such uses as he should, by his last will in writing, limit and appoint," and having then made a codicil to his will, attested by three witnesses, reciting the having made his will and altering some of the legacies therein, and then ratifying and confirming all and every the gifts, devises, and bequests, contained in his said will not thereby altered, the copyhold estate passes, the codicil operating as a republication, and bringing the will to the date of the codicil; *Doe v. Davie*, B. R. M. 15 G. 3. 716, & n. [2], 717, n.

35. But copyhold lands purchased after making a will do not pass by such will; *Spring v. Biles*, B. R. M. 24 G. 3. 1 Term Rep 435.

36. By a devise—"to A. and B. for their lives and the life of the survivor, but, in case B. should marry

"and have issue, then after the death of A. to B. and her heirs, but if B. should die unmarried and without issue, then to A. and her heirs"—A. and B. take a joint estate for life, with contingent remainders in fee to each; *Goodtitle v. Billington*, T. 21 G. 3.

Page 753 to 758

37. Instances where words in a will sufficient to pass a fee-simple, are restrained by subsequent words, to mean an estate-tail. 266, 267. 757

38. By this devise, viz.—"I give and demise to A. her heirs and assigns for ever, all my lands to B. and I give and bequeath to A. aforesaid, all my lands at C"—A. only takes an estate for life in the lands at C. and the reversion shall descend, although the will begin with these introductory words—"For those worldly goods and estates wherewith it hath pleased God to bless me."—and contain a legacy of 1*l*. to the heir at law; *Right v. Sidebotham*, T. 21 G. 3.

759 to 764

39. So, though a will begins with like introductory words No. 32., and then the testator gives all his freehold tenement lying in G. to A. B. and C. "to them my sister's sons," and then, among several pecuniary legacies, leaves 10*s*. to his heir at law, A. B. and C. take only for life, and the reversion descends; *Denn v. Gaskin*, B. R. M. 18 G. 3.

760, 761

40. So, where there are similar introductory words, (No. 32.), and the testator gives his house to a younger son S. and after the death of S. to A. and B. sons of S. and a legacy of 1*l*. to the husband of his heir at law, A. and B. only take for life, and the reversion descends; *Right v. Ruffel*, Scacc. H. 1 G. 3.

761

41. So, if, after a similar introduction (No. 32.), the testator gives all his real estate to his wife for life, and to his son P. after his wife's death all his land at W. and, among several legacies, 5*s*. each to all his grandchildren, among whom were his heir at law, P. shall only take the land at W. for

A Table of the Principal Matters.

W. for life, and the reversion shall descend. Page 761, 762, & n. [1]

42. Yet such introductory words are material in the construction of a will; *Maundy v. Maundy*, B. R. T. 8 G. 2. - 760, n. [1]

43. By a devise of—"all the right, title, and interest which I now have, and all the term and terms of years which I now have or may have in my power to dispose of, after my death, in whatever I hold by lease from Sir J. F. and also the house called the Bell tavern"—the fee-simple in the house called the Bell tavern passes. 762, 763

44. "All my estate" or "all my interest" are tantamount to an express devise in fee. - 763

45. But a devise of "all my lands at A." only passes an estate for life. 434, 763

46. *Vide* STOCK, No. 2.

† WILLS (*the Statute of*)

† *Vide* the TABLE of Statutes after title STATUTE.

† WINCHESTER (*the Statute of*)

† *Vide* the TABLE of Statutes after title STATUTE.

WITNESS.

1. The further recompence given by 5 *El. c. 9. § 12.* against a witness, for non-attendance, must be assessed by the court out of which the process issues, not by the jury, nor the judge at *Nisi Prius*; *Pierfon v. Iles*, H. 31 G. 3. - Page 556 to 561
2. Debt will lie on such assessment. 561
3. A witness who wilfully absents himself may be attached for the contempt. 561
4. Or an action on the case will lie against him. - 561
5. *Vide* COSTS, No. 10. EXECUTOR, No. 2. EVIDENCE. HABEAS Corpus, No. 1. TRIAL, No. 5. TRUSTEE, No. 1. WILL, No. 13, 14, 15, 16, 17.

WORKHOUSE.

Vide POOR-RATE, No. 1. RELIEF, No. 2.

W R I T.

Vide DEMURRER to Evidence, No. 4. ELEGIT. ENQUIRY. ERROR. EVIDENCE, No. 3. EXCHEQUER-Chamber. HUSBAND, No. 3. VERIFICATION, No. 1.

F I N I S.

687
18/12/69